

## Central Law Journal.

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LIFE INSURANCE—DISTRIBUTION OF PROCEEDS OF POLICY WHERE INSURED AND BENEFICIARY PERISH IN A COMMON DISASTER.—In a recent article in the CENTRAL LAW JOURNAL (53 Cent. L. J. 184), we discussed very exhaustively the interesting question taken as the subject of this editorial. Since that time several cases have arisen involving this identical question in which counsel have relied on this article very strongly. The recent Galveston disaster produced several of these cases, one of which has just reached the Texas Court of Civil Appeals,—Hildenbrandt v. Ames, 66 S. W. Rep. 128,—where it was held that where a life policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the beneficiary against the insurance company and the administrator of insured to recover the proceeds of the policy, the burden was on plaintiff to show that his decedent had survived the insured. In this case insured and the beneficiary, who was the wife of insured, both perished in the flood which swept over the city of Galveston recently. The administrator of the beneficiary sought to show that his decedent had survived the insured. It appeared that on the day of the storm insured had started out in a wagon, saying that he was going home to get his wife; and about 4 o'clock, while the storm was raging, a witness saw the wagon going along a street in which the water was running as high as the horse's belly, the horse moving as though he were being driven, but witness could not see whether there was any one in the wagon. The house where the beneficiary lived was not blown down or washed away until about 7:30. *Held*, that the evidence was insufficient to raise an issue as to the survivorship. The court thus practically distributed the proceeds of the policy as if both insured and beneficiary had died simultaneously, not because there was any presumption to that effect, but because there was no evidence to the contrary. Therefore, the administrator of the beneficiary, who was only to take "if surviving," took nothing under the policy,

the proceeds of which reverted to the insured's estate. Counsel for the administrator of the insured relied almost exclusively on the article in the CENTRAL LAW JOURNAL already referred to, and the court adopted the argument and reasoning therein set forth almost *verbatim*.

Our argument in that article was that the principles applicable to the distribution of trust funds should be applied to the solution of this question rather than the rules of law applicable to choses in action. This we regarded as necessary to overcome the doctrine of vested interest, which has been applied to the right of the beneficiary under a regular life policy. For, giving the word "vested" its full logical meaning, the beneficiary would have such a present interest in the proceeds of the policy, while living, that even where the enjoyment of the fund is conditional on her survivorship, such condition, or, in fact, any other condition, annexed to her right to take under the policy, would be a condition subsequent, and the burden of proving survivorship would be, not on the beneficiary or her representatives, but upon those who would seek to controvert her *prima facie* title to the proceeds of the policy. It was so held in the case of Cowman v. Rogers, 73 Md. 403. But, on the hand, applying the trust fund doctrine and giving to the words "vested interest" a limited meaning—that of an irrevocable right to demand the proceeds of the policy upon the happening of all contingencies and compliance with all the conditions of the policy—the beneficiary would acquire no vested interest in the proceeds until the death of the insured, and the distribution of the fund would then be governed by the ordinary rules of construction, and the beneficiary could take nothing until all contingencies and conditions of the policy had happened or been complied with, the burden of proof in such case resting upon her or her representatives. It was so held in Fuller v. Linzee, 135 Mass. 468. It is thus seen that the application of the trust fund doctrine easily disposes of the whole question. Under this view of the case the beneficiary is regarded as the *cestui que trust*, and the insurance company as the trustee of the fund represented by the policy, of which the insured may be regarded as the grantor. The fund

is to be paid over to the beneficiary, or *cestui que trust*, on the happening of all contingencies and compliance with all conditions named in the policy. The insurance company, as trustee, can certainly not be compelled to execute the trust until all contingencies have happened and all conditions complied with, and the burden is upon the beneficiary, or her representatives, as against the insurance company, to prove that all contingencies have happened and all conditions complied with, before any title to the fund vests in her, and unless her right to the fund is so proven there is a failure of the trust and reversion of the fund to the insured or his representatives. This is practically a synopsis of our argument in the article referred to, which was "mildly" criticised by some of our contemporaries who insisted that the problem could be satisfactorily worked out under the ordinary rules applicable to choses in action. The court in the principal case repudiates this suggestion and practically adopts our position as already outlined. The court, through Justice Pleasants, said:

"We think the contract in its nature is analogous to that of an express trust. The insured is the grantor or creator of the trust, the insurance company the trustee, and the beneficiary the *cestui que trust*. While the trust fund out of which the beneficiary is to receive the amount named in the policy cannot, strictly speaking, be said to have been created by the insured, by the terms of the contract he secures an interest in a fund provided by the insurance company equal to the amount named in the policy, payable at his death; and under this contract, which he obtains and keeps alive by the payment at stated times during his life of certain specified amounts to the insurance company, the amount named in the policy is held by the insurance company in trust for the beneficiary. If we consider the policy of insurance of partaking of the nature of a trust, rather than a chose in action, it is at once seen that the interest of the beneficiary is not a "vested" interest, in the broadest sense of that term, and the trustee cannot be compelled to execute the trust until the contingency happens which entitles the *cestui que trust* to its execution. It follows that the burden is upon the ben-

eficiary to show that such contingency has happened, and all the conditions which are necessary to vest the title to the fund in him have been complied with, and unless the beneficiary's right to the fund be shown there is a failure of the trust, and the fund reverts to the insured or his representatives."

#### NOTES OF IMPORTANT DECISIONS.

**WATERS AND WATER COURSES—WRONGFUL DIVERSION OF A STREAM IN DIFFERENT STATES FOR IRRIGATION PURPOSES.**—Water is the *sine qua non* of the great arid region of the west. Controversies over a twenty-five foot creek assume an extravagant importance. Such was the recent case of Conant v. Deep Creek & Curlew Valley Irrigation Co., 66 Pac. Rep. 188. In this case plaintiff, who resided in Utah, claimed priority of right to the use of a stream which arose in Idaho and flowed south through Utah, as against upper riparian owners, some residing in Utah and some in Idaho, for wrongful diversion of water. A judgment obtained in a court of Idaho determining the rights of the respective owners, both of Utah and Idaho, was attempted to be enforced against a riparian owner in Utah. The Supreme Court of Utah held that where a stream rises in the state of Idaho and flows into the state of Utah, a court of the former state has no jurisdiction to try and determine the title and right to the use of the water flowing in that portion of the stream which is situated in Utah, and there diverted and used for irrigation of lands therein. The court makes the following clear argument:

"It is insisted on behalf of the respondents that, if this court should hold that the Idaho court was without jurisdiction to enter the decree here sued on, then the Utah parties would have no court to resort to that could protect their property rights, and that the Idaho settlers could with impunity divert the waters from this stream in Idaho, and the Utah parties would be remediless. With this contention we cannot agree. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion; and if the settlers higher up on the stream, in another state, whose appropriations are subsequent, divert any of the waters of the stream which have been so first appropriated, then the courts of the latter state will protect the first settler in his rights. Howell v. Johnson (C.C.) 89 Fed. Rep. 556. The Idaho courts, therefore, have ample and complete jurisdiction to protect the rights of respondents to have the waters which they have appropriated, and which they divert in Utah, flow through the channel of the stream, and to limit and determine the rights of the Idaho appropriators with reference thereto;

and by the decree entered in the suit in the district court of Idaho, such rights were fully protected, and may be enforced by proper proceedings in that court. But this rule of law cannot be so extended as to give to the Idaho court jurisdiction to adjudicate and determine the rights, as between themselves, of the several appropriators who divert water from said stream in Utah, and use the same for irrigation upon lands in this state, and to quiet their titles thereto. Such matters are exclusively within the jurisdiction of this state, and, in so far as the decree of the Idaho court attempted to determine and quiet the title to such waters, it was a nullity, and could not form a foundation for this suit."

It is, of course, the rule that the courts of one state are without jurisdiction to hear and determine suits affecting the title to lands in another state. *Nelson v. Potter*, 50 N. J. Law, 324, 15 Atl. Rep. 375; *Carpenter v. Strange*, 141 U. S. 105, 11 Sup. Ct. Rep. 966. In this last case it was said: "While, by means of its power over the person of a party, a court of equity may, in a proper case, compel him to act in relation to property not within his jurisdiction, its decree does not operate directly upon the property, nor affect the title, but is made effectual through the coercion of the defendant. Hence, although, in cases of trust, of contract, and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, yet it does not follow that such a decree is in itself necessarily binding upon the courts of the state where the land is situated."

**NEGLIGENCE—LIABILITY OF SELLER OF EXPLOSIVES FAILING TO GIVE NOTICE OF DANGEROUS PROPERTIES.**—It would seem hardly possible at this stage of development of English and American common law to run upon a case upon which the text books and decided cases can furnish no authority. Such, however, according to the statement of the court, is to be found in the recent case of *Gibson v. Tarbert*, 88 N. W. Rep. 443. In this case, plaintiff, who was a poorly educated man, ordered a quantity of phosphorus of defendant, a druggist. Defendant sent three sticks, properly packed in water and labeled. Plaintiff removed the phosphorus from the package, and dropped one stick, which ignited, and, on his attempting to pick it up, caused the explosion of the remaining sticks in plaintiff's hands, injuring him severely. The Supreme Court of Iowa held that the article ordered was not such a new and unknown substance, with the dangerous qualities of which the general public, and therefore the plaintiff, was not acquainted, as to render defendant negligent in selling it without specific warning. The court further held that the fact that the letter ordering the phosphorus was badly spelled, incorrectly capitalized, and ungrammatical did not show such unfamiliarity with the nature of the drug

on the part of the writer as to render defendant wanting in ordinary care in sending the article without warning as to its dangerous properties.

Counsel cited a number of authorities, but it must be admitted that they are not exactly in point. *Elkins v. McKean*, 79 Pa. 493, was a case in which the manufacturers of illuminating oil branded it as bearing a fire test of 110°, when in fact it only tested 64° or 65°. In *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, gunpowder was sold to an 8-year-old boy. And in *Dixon v. Bell*, 5 Maule and S. 198, a loaded gun was given to a girl 13 or 14 years old; and while in her hands it was discharged, injuring another. In *Schubert v. J. A. Clark Co. (Minn.)*, 51 N. W. Rep. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, the plaintiff was injured by the breaking of a stepladder upon which he was standing while at work. The ladder was constructed of rotten wood, which was concealed by paint and varnish. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, is an early case in this country, and is often cited, but it is a case in which a poisonous drug was falsely labeled. In *Wellington v. Oil Co.*, 104 Mass. 64, the defendant sold dangerous oil, not safe for illuminating purposes, to a customer whom it knew had no knowledge of its dangerous character, and intended to sell it for illuminating purposes. *Railroad Co. v. Shanly*, 107 Mass. 568, though not cited by counsel, is a case in which gunpowder manufacturers shipped over the plaintiff's road what was alleged to be "new, dangerous, explosive, combustible, and inflammable compound, recently discovered and manufactured, called by a new name, not generally known, now new in the market, and the qualities were and are not generally known, made in part of nitroglycerine, itself an exceedingly dangerous explosive and combustible substance." The substance was shipped as "Dualin," and it was alleged in the declaration that not only was the plaintiff railroad company not notified of its dangerous character, but, on the contrary, it was assured that it was safe, and not of a dangerous nature. A demurrer to the declaration on the ground that it did not state a cause of action was overruled.

After reviewing the authorities, the court, through Sherwin, J., lays down what it considers the proper rule: "We believe the true rule deducible from reason and from authorities is that when a person who has reached the age of discretion, and who is apparently in the possession of his mental faculties, applies to a druggist for a certain drug, he represents to the dealer, by implication, at least, that he knows its properties and uses, and that he is a fit person to whom sale thereof may be made, and that unless there is something connected with the transaction, or something previously known to the seller, indicating that the would-be purchaser cannot safely be intrusted with the substance, a sale of the substance called for may be made without explaining its properties or the manner in which it

may be safely used or handled, and that, under such circumstances, the seller is not liable in damages for injuries to the purchaser resulting from the improper use or handling of the article, no matter how little knowledge the purchaser may in fact have had of its properties, or of the manner in which it could not be safely used or handled. It appears clear to us that the vendor's legal duty to such a purchaser can go no further than to give him the identical substance he calls for.<sup>1</sup>

#### LIABILITY OF OWNERS OF VESSELS FOR TORTS OF MATE, AND INJURIES INFILCTED ON ROUSTABOUTS.

A subject of general interest to practitioners in the Mississippi Valley is, to what extent the owners of vessels plying upon those inland waters are liable for injuries inflicted upon the roustabouts, or common seamen, by the mates or petty officers of such vessels.

In a suit brought before Judge E. S. Hammond in the United States District Court for the Western District of Tennessee,<sup>2</sup> it was held that the owners were liable, but only for actual damage. In that case Hall, a roustabout, sued Sims, the captain of The General Rucker, for injuries inflicted by the mate, who struck Hall on the head with a monkey wrench. The court held that a roustabout employed in loading a vessel under the command of a mate, who is wounded by the blows of the mate, given because he does not obey his orders, can recover for the injury against the owner, because that business about which they are both engaged is within the scope of the master's employment, and clearly so. If it were not, the rule of the liability of the master for the willful torts of his servant while thus engaged would be substantially abrogated. No master intentionally authorized his servant to do any wrong of his own malevolence, passion, or ill-temper, and, presumably, always forbids it, as was actually done in this case, for the mate had orders not to beat the men; and if a want of that kind of authority in the servant exempts the master, there could scarcely arise a case where the liability would exist, and the rule would be narrowed to the exploded doctrine that the master is liable only for the negligence but not for the torts of

his agent. It is a mere controversy about words upon unsubstantial distinctions, for the practical rule is that the master must not employ malevolent, impassioned, or ill-tempered agents, if he does not wish to become liable for the injuries they inflict through the exhibition of ill-temper in doing his work.<sup>3</sup> This case stands solitary and alone. It is contrary to the rule of law, opposed to the reason of rule, in conflict with the universal course of the decisions of the courts, state and federal, and is directly in the teeth of a recent decision of the Supreme Court of Tennessee in a case on all fours with the case at bar.<sup>4</sup> Moreover, Judge Hammond does not seem to have considered the most important feature in the case before him, and the authorities he cites in his opinion do not support his conclusions or apply to the facts of the case.

*The Rule of Law.*—In the first place, the relations, duties and obligations between various members of a ship's company are regulated, not by the common law, but by the maritime law.<sup>5</sup> "The maritime law furnishes entirely different doctrines upon this, as well as many other subjects, from the common law. They (seamen) are liable to different rules of discipline and suffering from landsmen. It is possible, therefore, with any degree of security, to reason from the doctrines of the mere municipal code, in relation to purely home pursuits, to those more enlarged principles which guide and control the administration of the maritime law."<sup>6</sup> In *The City of Alexandria*, Brown, J., says: "By the maritime law, the mere ordinary negligence of the seaman, though that be the sole cause of the accident, makes no difference in his right to be cured at the ship's expense, and to his wages to the end of the voyage. And as his own negligence does not debar him from these rights by the maritime law, so, conversely, these rights are in no way extended, though his hurts have arisen by the negligent acts of others of the ship's company."<sup>7</sup> This fundamental distinction is nowhere referred to by Judge Hammond nor does he seem to have consid-

<sup>2</sup> *Smith v. Memphis & A. C. Packet Co.*, 1 S. W. Rep. 104.

<sup>3</sup> *Reed v. Canfield*, 1 Sumn. 195, cited in *The City of Alexandria*, 17 Fed. Rep. 390.

<sup>4</sup> 17 Fed. Rep. 390.

<sup>5</sup> 17 Fed. Rep. 396.

<sup>1</sup> "*The General Rucker*, 32 Fed. Rep. —

ered it, none of the cases cited in the opinion dealing with injuries inflicted upon seamen by officers or members of the crew. In the second place, the relation of fellow-servant, which exists between the mate of the ship and the seaman, or rousters, as they are called on vessels plying on the Mississippi river, seems not to have been raised or considered by the court in *The General Rucker* case, and yet it should have been one of the main defenses relied on. In this, as in many other respects, the doctrines of the maritime law differ greatly from the common law. Judge Hammond appears to have taken it for granted that the mate is the superior of the rouster, and that the wrongful act of the mate, or his negligence, render the owner liable to respond in damages to the injured rouster. This might possibly be the case, so far as negligence is concerned, under the common law, had the parties been foreman and laborer, say; but, under the maritime law, the case is entirely different.

*Fellow-Servants — Who, then, Constitute the Ship's Company Under the Maritime Law, and Who are Fellow-Servants.*—In "*The City of Alexandria*"<sup>6</sup> the chief cook and the steward were held to be fellow-servants, and the owners of the ship were held not liable for injuries resulting to the cook by the negligence of the steward, although the cook was acting under his orders. In *United States v. Huff*,<sup>7</sup> the mate was held to be one of the crew and subject to the provisions of a penal statute, which, in terms, applied only "the crew." In "*The Egyptian Monarch*,"<sup>8</sup> the second mate and an ordinary seaman were held to be fellow-servants, and the owners not liable for injuries suffered by the seaman on account of the mate's negligence. The court said: "Conflicting decisions on this question may be found in our own courts—federal and state—but numerous and respectable authorities among them classify the subordinate officers of a ship as fellow-servants with the members of the crew, who are subject to their orders. The prevailing opinion is, that when the master is on board the subordinate officers and seamen are fellow-servants."<sup>9</sup>

<sup>6</sup> 17 Fed. Rep. 390.

<sup>7</sup> 13 Fed. Rep. 630.

<sup>8</sup> 36 Fed. Rep. 776.

<sup>9</sup> 36 Fed. Rep. 776 (citing numerous authorities).

In *The Queen Steamship Co. v. Merchant*,<sup>10</sup> the porter and carpenter were held to be fellow-servants with the stewardess, though working in different departments, and the owners not liable for the injuries to the stewardess arising out of their negligence. In *Gabrielson v. Waydell*,<sup>11</sup> the captain of the ship was held to be the fellow-servant of a seaman, and the owners not liable for an assault by the captain growing out of the refusal of the seaman to obey orders. All of these cases, except the last cited, deal with mere acts of negligence, but when we come to consider the liability of the master for the tortious acts of fellow-servants towards each other, and for assaults upon members of the crew by the officers, the rule of the law is radically different from that laid down by Judge Hammond, even under the common law.

*Master's Liability for Torts.*—From the very earliest times in Tennessee it has been held that the master is not liable for the willful torts of his servant. In *Puryear v. Thompson*<sup>12</sup> an overseer, being charged to give a negro slave a good whipping, beat him to death. The trial judge was asked to charge that, if the master had instructed the overseer to whip the negro until he was humbled and then put him to work, and if the master then left the place of punishment, and the overseer, abandoning all intentions to comply with such instructions, undertook to gratify his own malice and spite against the negro, and in the gratification of this malice killed him, then the master would not be liable. The court held that the refusal of this charge was error, and remanded the case for a new trial, laying down clearly the proposition that such action would be the willful tort of the overseer, for which the master was not liable, it not being within the scope of his employment. In *Cantrell v. Colwell*,<sup>13</sup> Cantrell's wife requested a young man to put a mare belonging to Colwell out of her husband's field. While so doing the young man threw a rock at the mare and broke her leg. The court said: "That the young man was Cantrell's servant; that the scope of his employment was to put the mare out of the field, but in no way could this be tortured to

<sup>10</sup> 133 U. S. 379.

<sup>11</sup> 31 N. E. Rep. 969.

<sup>12</sup> 5 Humpb. 397.

<sup>13</sup> 3 Head, 474.

imply any authority or command to injure or destroy the animal in so doing. The fair inference would be the exact opposite of this. The act of violence, by which the loss was occasioned, was not done in execution of authority given, but was altogether beyond it, and must be regarded as the willful, wanton and unauthorized act of the servant, for which he, himself, and not the defendant must be answerable." In Ottenville v. Deihl & Lord,<sup>14</sup> plaintiff sued the defendant for certain bottles and cases, which he alleged had been willfully and wantonly destroyed by the defendant's servants. The proof showed that the destruction of the property was not commanded by the master, but was due to the personal ill-will of the employees towards a rival concern. The court held: "That the master cannot be responsible for such wrongful conduct of the servant, as he had neither authorized, nor could be supposed to have authorized or expected the servant to do. A liability so extensive would make the master guarantor of the servant's good conduct, and would impose responsibilities which prudent men would hesitate to assume." This case, Judge Hammond says, it is doubtful if the Supreme Court of Tennessee would now adhere to, and yet the 5 Humph. the 3 Head, and the 14 Lea cases were all cited with approval by that court as late as 1886 in the case of Smith v. Memphis and A. C. Packet Co.,<sup>15</sup> Chief Justice Deadrick delivering the opinion. In that case a mate, hurrying up the roustabouts unloading freight had an altercation with one of them, and during the course of the altercation struck him. It was held that the act of the mate was not negligence, but a willful, personal tort, that said act was not done within the scope of the servant's employment, and the master was not liable for it. This case, identical with the case of The General Rucker, has never been modified by the Supreme Court of Tennessee and settles the question, so far as that state is concerned. In Spencer v. Kelly,<sup>16</sup> the master of the ship, not the mate, ordered the seaman to leave the wheel in the pilot house. The seaman refused, and resisted the effort of the captain to manage the wheel, who thereupon assaulted him, and afterwards

continued the assault upon deck. The court held: "That all employees on a ship are fellow-servants under the master, and that for injuries inflicted by such fellow-servants the owner would not be liable. That the master had a right to enforce obedience to his orders by whatever force was necessary in a case of emergency. That if the master punished the seaman for disobedience, after the emergency had passed, such punishment was not within the scope of his employment, and the owner would not be liable." By a parity of reasoning, where there was no emergency, no danger threatening the safety of the ship or the crew, the punishing of the roustabout by the mate cannot make the owner liable in damages. In the case of Gabrielson v. Waydell,<sup>17</sup> already cited in support of another proposition, the captain assaulted a seaman for refusal to obey orders, the man alleging that he was sick. The court held that such assault was not within the scope of the captain's employment and that it was the tortious act of a fellow-servant for which the owner was not liable.

*The Reason of the Rule.*—The reasoning of the decisions quoted, and of many others that might be cited, is as strong against The General Rucker case as the cases themselves. The torts of the servant cannot subject the master to liability because they are not within the scope of the servant's employment. The master does not guarantee the good temper and benevolence of his servant. If the servant, even while engaged about the master's business, does an act which he is not commanded to do, which the master could not suppose he would do, could not prevent him from doing, and which the proper discharge of his duty did not require him to do, either prudently or imprudently, then such an act is the willful and malevolent tort of the servant, and the master not liable for it.

R. G. BROWN.

<sup>14</sup> 14 Lea, 193.

<sup>15</sup> 1 S. W. Rep. 104.  
<sup>16</sup> 32 Fed. Rep. 838.

#### MURDER—UNCONTROLLABLE IMPULSE AS A DEFENSE.

##### STATE v. KNIGHT.

*Supreme Judicial Court of Maine, August 13, 1901.*

1. It is still held by an overwhelming weight of judicial authority that, when the insanity of the accused is pleaded in defense, the test of his responsi-

bility for crime afforded by his capacity to understand the nature and quality of the act he was doing, and his mental power to distinguish between right and wrong with respect to that particular act at the time he committed it, is the only proper legal criterion; and that, when fully developed and explained to the jury in its application to the special facts and circumstances of different cases, it will always be found adequate to meet the demands of justice and humanity towards the accused, as well as to insure the protection and safety of the public.

2. It is evident that much of the diversity of opinion or the difference in modes of expression upon this subject arises from a failure to discriminate between that irresistible impulse produced by an insane delusion or mental disease which has progressed to the extent of dethroning the reason and judgment and destroying the power of the accused to distinguish between right and wrong as to the act committed, and that uncontrollable impulse which is alleged to arise from mental disease, and to coexist with the capacity to comprehend the nature and wrongfulness of the act, but which may, with equal reason and consistency, be attributable to moral depravity and criminal perversity.

WHITEHOUSE, J.: In this case the respondent was indicted and tried for the murder of Mamie Small. It was not in controversy that the accused, if responsible for his act, was guilty of murder in the first degree, and the only issue raised in defense was the insanity of the defendant. The jury returned a verdict of "Guilty of murder in the first degree," and the case comes to this court on exceptions taken by the defendant to the refusal of the presiding justice to give certain instructions:

Third. If the jury find that the prisoner at the time of killing Mamie Small had a diseased mind; that such mental disease caused him to determine to kill her; that by reason of such mental disease he did not then have sufficient will power to refrain from committing the act; and that the act was the product of such mental disease,—he was not responsible for the act, although then conscious that the act was wrong and punishable.

Fourth. Criminal intent involves a sound will as a part of the requirement of a sound mind. That a person is shown to have had, at the time of the act, capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was then doing, does not necessarily make him responsible. If the jury find that the mind of the prisoner at the time of killing Mamie Small was diseased; that by reason of such mental disease his will power was then impaired; that by reason of such impairment of his will power so caused he did not then have sufficient will power to refrain from committing the act; and that the act was the product of such mental disease,—he was not responsible for the act, although he then had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act.

The relations between the respondent and the deceased, and the circumstances attending the commission of the homicide, are thus stated in

the charge: "To prove the presentment, in the first instance, the state has introduced evidence tending to show that, upon the 17th day of February last, Bradford Knight was acquainted with Mamie Small. Had married her sister. Had been intimate with her, probably to an undue degree. I think there is no question but that he was, as we say, criminally intimate with her,—had sexual relations with her forbidden by law, and amounting to the crime of adultery. That he had known her many years. That on the afternoon of February 17th, shortly after or about dinner time, he was on the other side of the river, in the town of Randolph, inquiring for the residence of the man with whom Mamie Small at that time was boarding. That he went up to the residence, and then came back. He is afterwards seen going to Augusta, then going back to Gardiner, and is seen in the evening upon the common in Gardiner, as you have heard described by a witness, walking back and forth alone in the walks of that common. Then it appears by another witness that Mamie Small, in the evening, left her boarding place upon the Randolph side with a young boy, came across the bridge into Gardiner, and passed up by this common, where he was walking back and forth. That he came out and addressed her, and inquired what the trouble was about, and that she replied to him sharply that if he did not let her alone she would make trouble for him. That she thereupon started to run ahead, and turned into a walk, past a house, into the back door of a house. That he followed on after her, if I remember correctly, cutting across the sidewalk, not following around the turn, but cutting across, reached her, seized her with his left hand, and fired three shots at that close range into her body. That she screamed and fell. That he started and ran back, meeting some one, and telling him that the shots were from another direction, and went on down to his old home in Richmond."

The facts disclosed by the state's evidence, as well as those adduced in behalf of the respondent, were then carefully grouped and critically reviewed by the presiding justice, special attention being called to the following memorandum found on the respondent's person after the homicide, and relied upon as an important evidence in his behalf, to-wit:

"Feb. 17, 1899.

"I am in Gardiner to-night for the purpose of shooting Mamie Small. I have been to Augusta to see my wife to get her to go to Gardiner to see Mamie and talk with her, and see if she can't fix up the trouble between Mamie and I."

It is not in controversy that the instructions actually given to the jury were in entire harmony with the intellectual test of criminal responsibility approved in State v. Lawrence, 57 Me. 574, and cases there cited, and that the refusal to give the requested instructions was fully justified by the doctrine of that case. But it is earnestly contended by the learned counsel for the defendant

that an uncontrollable insane impulse to commit a criminal act may coexist with full knowledge of the wrongfulness of the act, and that the legal test of responsibility for crime afforded by the knowledge of right and wrong, respecting the act committed, has proved to be insufficient and unsatisfactory. It is accordingly insisted that the time has now arrived when this criterion of responsibility can be safely modified by incorporating into the rule the element of irresistible impulse presented in the defendant's requests.

It is undoubtedly true that the progressive development of the medical jurisprudence of insanity more enlightened views have gradually prevailed respecting the functional activity of the mind, and the course of symptoms indicating mental disease, and that just conclusions have more frequently been reached by courts and juries in recent years in regard to the relation of insanity to criminal responsibility. But since the announcement of the decision by this court in *State v. Lawrence*, *supra*, in the year 1870, this abstruse and difficult question has been the subject of exhaustive re-examination and renewed study, in the light of all modern discoveries of scientific truth bearing upon it by the most eminent medical and legal jurists in this country and England, and by courts of the highest authority in both countries; and it is still held by an overwhelming weight of judicial authority that, when the insanity of the accused is pleaded in defense, the test of his responsibility for crime afforded by his capacity to understand the nature and quality of the act he was doing, and his mental power to distinguish between right and wrong with respect to that particular act at the time he committed it, is the only proper legal criterion; and that, when fully developed and explained to the jury, in its application to the special facts and circumstances of different cases it will always be found adequate to meet the demands of justice and humanity towards the accused, as well as to insure the protection and safety of the public.

In Brown's "Medical Jurisprudence of Insanity," published in England in 1875, and republished in this country, the author critically analyzes the famous answers given by the English judges to the questions proposed to them by the house of lords after the trial of MacNaughton in 1843 (sections 10-14), which have formed the basis of the prevailing rule since that time, and the one approved in *State v. Lawrence*, *supra*, and then proceeds as follows (section 15): "After the fullest examination of the medical opinions on the other side, we are constrained to hold that the answers of the judges are a most satisfactory statement of the law, and that no better test of responsibility could, at the present time, be devised than that which makes knowledge of right and wrong at the time of the commission of the act the means of judging of the punishability of the person who has committed a criminal offense. 'Although not a test of insan-

ity,' says Dr. Hammond, 'the knowledge of right and wrong is a test of responsibility.' \* \* \* Any individual having the capacity to know that an act which he contemplates is contrary to law should be deemed legally responsible and should suffer punishment. He possesses what is called by Bain 'punishability.' \* \* \* The only forms of insanity which, in my opinion, should absolve from responsibility, \* \* \* are such a degree of idiocy, *dementia*, or mania as prevents the individual from understanding the consequences of his act, and the existence of a delusion in regard to a matter of fact which, if true, would justify his act."

In the elaborate work on Medical Jurisprudence by Wittthaus and Becker, published in New York in 1896, is a treatise on the Medical Aspects of Insanity in its Relations to Medical Jurisprudence, by Dr. Fisher, of New York. In that portion of the treatise devoted to "Impulsive Insanity", the author says (volume 3, p. 273): "The practice of the courts in England and in this country, following the trial of MacNaughton in 1843, has been that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts, unless it can be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did, that he did not know he was doing wrong. Under these rules, which may be taken as outlining the law on this subject in a large number of the United States, the defense of irresistible impulse to do what is known to be morally wrong and what is legally a crime cannot be set up; for if the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, it is punishable. \* \* \* All forms of crime may be committed under the influence of irresistible impulse,—homicide, suicide, arson, theft, and various acts indicative of sexual perversion. We may also have melancholia or mania associated with this condition, and more rarely delusions and hallucinations. It is not, however, in these latter conditions that we should consider this disease as an entity. In fact, the only safe course is to follow the *dictum* of the law in this respect, which virtually says that irresistible impulse is no defense unless a symptom of insanity."

Again, in the treatise on Mental Unsoundness in its Legal Relations, in the same volume, by Mr. Becker, the author says, on pages 421, 422: "But evidence of the loss of control of the will, or of morbid impulse, does not constitute a defense, except when it demonstrates mental unsoundness of such a character as to destroy the power of distinguishing right or wrong as to the particular act. \* \* \* This rule is the legal essence of the whole matter, and it avoids much of the confusion which the German jurists and metaphysicians have infused into this subject.

The New York Court of Appeals in the case of Flanagan v. People (1873), 52 N. Y. 467, 11 Am. Rep. 731, said: 'We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them, and that the absence of the former is consistent with the presence of the latter. The argument proceeds upon the theory that there is a form of insanity in which the faculties are so deranged that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates, but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, in cases of crime, may well cause courts to pause before assenting to it. Indulgence in evil passions weakens the restraining power of the will and conscience, and the rule suggested would be the cover for the commission of crime and its justification. The doctrine that criminal act may be excused upon the notion of an irresistible impulse to commit it, where the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law.'

This rule was subsequently incorporated into the Penal Code of New York, and reaffirmed in People v. Carpenter (1886), 102 N. Y. 238, 6 N. E. Rep. 584, and in People v. Taylor (1893), 138 N. Y. 398, 34 N. E. Rep. 275.

In the "Medical Jurisprudence of Insanity or Forensic Psychiatry," by Dr. S. N. Clevenger, of Chicago, published in 1898, the author concedes that the test of right and wrong as to the particular act charged is generally accepted in the United States in determining the question of responsibility for crime (volume 2, p. 18), and abundantly justifies the concession by a vast array of "Legal Adjudications in Criminal Cases," cited in chapter 7 of the same volume.

In State v. Erb (1881), 74 Mo. 199, a requested instruction that if the accused "was incapable of distinguishing right from wrong, or of exercising control or will power over his actions, or was unconscious at times of the nature of the crime he was about to commit," he should be acquitted, was held to have been properly refused, and this decision was reaffirmed in State v. Pagels (1887), 92 Mo. 300, 4 S. W. Rep. 933, the court saying in the opinion in the latter case: "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts."

In a very elaborate discussion of this subject by the supreme court of appeals in State v. Harrison

(1892), 36 W. Va. 729, 15 S. E. Rep. 982, 18 L. R. A. 224, the authorities are critically examined and compared, and the doctrine of "Irresistible impulse" emphatically repudiated. In the opinion it is said: "For myself, I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse, and not criminal design and guilt? \* \* \*

"I admit the existence of irresistible impulse, and its efficacy to exonerate from responsibility, but not as consistent with an adequate realization of the wrong of the act. It is that uncontrollable impulse produced by the disease of the mind, when that disease is sufficient to override the reason and judgment and obliterate the sense of right as to the act done, and deprive the accused of the power to choose between them. This impulse is born of the disease, and when it exists, capacity to know the nature of the act is gone. This is the sense in which 'irresistible impulse' is defined in Hobbs v. People, 31 Ill. 385, 83 Am. Dec. 231, and Dacey v. People, 116 Ill. 556, 6 N. E. Rep. 165." See, also, State v. Felter, 25 Iowa, 67; State v. Mewherter, 46 Iowa, 88; State v. Nixon, 32 Kan. 205, 4 Pac. Rep. 159; Ortewein v. Com., 76 Pa. 414, 18 Am. Rep. 420; People v. Hoin, 62 Cal. 120, 45 Am. Rep. 651; U. S. v. Guiteau (D. C.), 10 Fed. Rep. 195.

In the history of the criminal law of England, by Mr. Justice James Fitz-James Stephens, published in 1883, after a searching examination of the latest and most authoritative medical works upon insanity, and a critical review of the English law upon the question of responsibility for crime, the distinguished author says (volume 2, pp. 170, 171): "The man who controls himself refers to distant motives and general principles of conduct, and directs his conduct accordingly. The man who does not control himself is guided by the motives which immediately press upon his attention. If this is so, the power of self-control must mean a power to attend to distant motives and general principles of conduct, and to connect them rationally with the particular act under consideration; and a disease of the brain which so weakens the sufferer's powers as to prevent him from attending or referring to such considerations, or from connecting the general theory with the particular fact, deprives him of the power of self-control.

"Can it be said that a person so situated knows that his act is wrong? I think not, for how does any one know that any act is wrong except by comparing it with general rules of conduct which forbid it? and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong? \* \* \* If the words 'know' and 'wrong' are construed as I should construe them, I thin-

this is a matter of no importance, as the absence of the power of self-control would involve an incapacity of knowing right from wrong. \* \* \* All that I have said is reducible to this short form: Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired the other is disabled. It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control."

It is evident that much of the diversity of opinion or difference in modes of expression upon this subject arises from a failure to discriminate between that "irresistible impulse" produced by an insane delusion or mental disease which has progressed to the extent of dethroning the reason and judgment and destroying the power of the accused to distinguish between right and wrong as to the act he is committing, and that uncontrollable impulse which is alleged to arise from mental disease, and to coexist with the capacity to comprehend the nature and wrongfulness of the act, but which may with equal reason and consistency be attributed to moral depravity and criminal perversity.

In the case at bar it has been seen that the defendant's requests do not assume the existence of an insane delusion or any mental disease sufficient to override his reason and judgment, obliterate his sense of right and wrong, and deprive him of the power to choose between them. On the contrary, they presuppose "sufficient mental capacity and reason to enable him to distinguish between right and wrong as to particular act," and still declare him irresponsible if by reason of mental disease he did not have "sufficient will power to refrain from committing the act."

It is contended, in behalf of the state, that the requests present a contradictory and impossible state of mind in thus assuming that the accused may have no insane delusions as to the act he is committing, and have full capacity and mental power to comprehend the nature and consequences of the act, to know that it was unlawful and wrong and would subject him to punishment, and yet have no power to refrain from committing it. But, whatever may eventually be declared by the great body of medical jurists to be the psychological truth in regard to the co-existence of uncontrollable impulse and such full capacity to distinguish right from wrong in regard to the act in question, at present, without clear and conclusive proof that such a state of mind may exist, and in the absence of any satisfactory test for the discovery of its existence that would be universally applicable in the practical administration of the criminal law, this court must adhere to the rule approved in *State v. Lawrence*, *supra*, which, as construed and applied in this state, has proved to be an adequate and satisfactory criterion for determining the punishability of the accused when a plea of insanity is interposed in defense.

Furthermore, in the case at bar, if such a state of mind as that contemplated by the requests may in reality exist, and the rule contended for be abstractly correct, there is nothing in the evidence presented in the careful and accurate recapitulation of the presiding justice which has any necessary tendency to prove that the accused, at the time he committed the act, was impelled by an insane delusion respecting it, or by any uncontrollable impulse caused by mental disease. The requested instructions would not have been relevant to any proposition which the facts in evidence necessarily tended to establish. The requested instructions were therefore properly refused.

As already shown, the instructions actually given were in strict conformity\* with the rule which has hitherto prevailed in this state, and their application to the facts in evidence was made plain by the full and apt explanations given in the luminous charge of the presiding justice.

Exceptions overruled.

Judgment for the state.

**NOTE.—Insanity—An Irresistible or Uncontrollable Impulse as a Defense to a Criminal Act.**—The general subject of insanity as a defense to crime is of too great magnitude to be treated in a single annotation. We might note a few general propositions, however. It is a well recognized principle of criminal law that since crime includes both the act and the intent, and an unsound mind cannot form a criminal intent, insanity is a complete answer to a criminal charge. See *Ancient Order of United Workmen v. Holdom*, 51 Ill. App. 200; *Sage v. State*, 91 Ind. 141. It must also be borne in mind that the law does not require that the insanity, which absolves from crime should exist for any definite period, but only that it exist at the moment when the act occurred with which the accused stands charged. See *State v. Gravatte*, 22 La. Ann. 557; *Shultz v. State*, 13 Tex. 401; *State v. Spencer*, 21 N. J. Law, 196. The legal test of the accountability of a criminal for his acts is his mental ability, at the time of the commission of the crime, to discriminate between right and wrong, with respect to the offense charged in the indictment. This is a succinct statement of the rule laid down by the weight of authority. See *State v. Schaefer*, 116 Mo. 96, 23 S. W. Rep. 447; *United States v. Faulkner*, 35 Fed. Rep. 730; *State v. Murray*, 11 Oreg. 415, 5 Pac. Rep. 55; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193; *Hoenish v. People*, 142 Ill. 620, 32 N. E. Rep. 677, 18 L. R. A. 237; *Grissom v. State*, 62 Miss. 167; *State v. McIntosh*, 39 S. Car. 97, 17 S. E. Rep. 446; *State v. O'Neil*, 51 Kan. 661, 33 Pac. Rep. 287, 24 L. R. A. 555; *State v. Brandon*, 53 N. Car. 463; *Leach v. State*, 22 Tex. App. 279, 58 Am. Rep. 638. As was said in the last case cited, the law does not require, as the condition for criminal responsibility, the possession of one's faculties in full vigor, unimpaired by disease or infirmity. The mind may be weakened by disease, or impaired, and yet the accused be criminally responsible. He can only discharge himself from responsibility by proving that his intellect was so disordered that he did not know the nature and quality of the act he was doing, and that it was an act which he ought not to do.

We now come to the question of uncontrollable impulses. Here the subject becomes a little clouded.

We may safely state that the rule adopted by the weight of American authority is that an irresistible impulse is not an excuse for the commission of a crime, where the person committing it is capable of knowing right from wrong. *State v. Miller*, 111 Mo. 542, 20 S. W. Rep. 248; *People v. Hain*, 62 Cal. 120, 45 Am. Rep. 651; *State v. Harrison*, 36 W. Va. 729, 18 L. R. A. 224; *State v. Scott*, 41 Minn. 365, 43 N. W. Rep. 62; *Wilcox v. State*, 94 Tenn. 106, 28 S. W. Rep. 312; *Cunningham v. State*, 56 Miss. 269, 21 Am. Rep. 360; *State v. Alexander*, 30 S. Car. 74, 14 Am. St. Rep. 879; *People v. Taylor*, 138 N. Y. 398, 34 N. E. Rep. 275. Other cases add an additional element to the rule as follows: One who knows his act to be wrong, and has power of mind to refrain doing it, cannot claim exemption from punishment on the plea of insanity. *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *State v. Newherter*, 46 Iowa, 88; *State v. Windsor*, 54 Har. (Del.) 512; *Dunn v. People*, 109 Ill. 685. Some states, like Indiana, go still further, and hold to an almost contrary rule which is announced in a comparatively recent case as follows: A person may not be criminally responsible, though having sufficient mental capacity to know right from wrong, if his will power is so impaired that he cannot resist an impulse to commit a crime, for in that case he is not of sound mind. *Flake v. State*, 121 Ind. 433, 23 N. E. Rep. 273, 16 Am. St. Rep. 408; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193; *Roberts v. State*, 3 Ga. 310.

These are the general propositions as laid down by the authorities on this interesting question. It is useless to attempt to reconcile the language used. We can merely give a statement of the exact point decided in each case. Let us examine in detail the more recent cases. In the case of *State v. Jones*, 50 N. H. 369, it was held on a trial for murder, where the defense was insanity, that a charge that insanity is a mental disease, and that an act produced by a mental disease is not a crime, and that if defendant had a mental disease which irresistibly impelled him to kill, and the killing was the product of mental disease, he is not guilty,—is correct. In the case of *Shannahan v. Commonwealth*, 71 Ky. 463, it was held that one so insane as not to know right from wrong, or possessed of moral insanity from the existence of natural propensities which render it impossible for him not to yield to them, is irresponsible. In *Fanagan v. People*, 52 N. Y. 467, the court held that the test of capacity is whether the defendant was able to distinguish right from wrong at the time the act was done. The doctrine of uncontrollable impulse, as coexisting with a perception of the moral quality of the act done, was rejected as "a new element" which had not been accepted by courts of law. In *State v. Scott*, 41 Minn. 365, the court held that in view of a statute defining insanity as a defense to crime, an uncontrollable impulse to commit a crime, in the mind of one who is conscious of the nature and quality of the act, or that it was wrong, is not allowed as a defense. The most pronounced authority in favor of uncontrollable impulse as a defense to crime is that of *Parsons v. State*, 81 Ala. 577, in which the court states the rule in very unambiguous language: "The capacity to distinguish between right and wrong, either abstractly or as applied to the particular act, as a legal test of responsibility for crime, is repudiated by the modern and more advanced authorities, legal and medical, who lay down the following rules which the court now adopts: (1) where there is no such capacity to distinguish between right and wrong as applied to the particular act, there is no legal responsibility; (2) where there is

such capacity, a defendant is nevertheless not legally responsible, if, by reason of the *dubious* of mental disease, he has so far lost the *power to choose* between right and wrong, as not to avoid doing the act in question, so that his free agency was at the time destroyed; and, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product or offspring of it *solely*." In this case will be found a complete exhaustive and very interesting discussion of this entire question. See also same case reported in 2 South. Rep. 854, and in 60 Am. Rep. 193.

Moral insanity, which consists of irresistible impulse coexisting with mental sanity, has no support either in psychology or law. It is therefore no excuse for crime. *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *People v. Kerrigan*, 73 Cal. 222, 14 Pac. Rep. 849; *People v. Finley*, 38 Mich. 482. Some cases, however, seem to recognize it. Thus in *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669, it was said: "The courts have been slow to recognize moral insanity as a defense to crime; but that it exists, and is well understood, and in some cases clearly defined, by medical and scientific men cannot be denied." So also in *Scott v. Commonwealth*, 45 Ky. 227, 83 Am. Dec. 461; *Shannahan v. Commonwealth*, 71 Ky. 463.

#### BOOK REVIEWS.

##### CRAWFORD'S ANNOTATED NEGOTIABLE INSTRUMENTS LAW.

Codification is one of the strongest tendencies of latter day jurisprudence and its most healthy offspring is undoubtedly what is known as the Negotiable Instruments Law. In 1895 the Conference of Commissioners on Uniformity of Laws, which met that year in Detroit, instructed the Committee on Commercial Law to have prepared a codification of the law relating to bills and notes. The matter was referred to a subcommittee consisting of Lyman D. Brewster, of Connecticut, Henry C. Wilcox, of New York, and Frank Bergen, of New Jersey. Mr. John J. Crawford, of the New York bar, was employed to draft the proposed law. This draft, after being submitted for amendment and criticism to many prominent jurists, was adopted by the conference which met at Saratoga in August, 1896. It was then submitted to the legislatures of the different states and has so far been adopted in the following: New York, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, Tennessee, Florida, Wisconsin, North Dakota, Colorado, Utah, Oregon, Washington and the District of Columbia. In the years which have elapsed very few decisions have arisen under this act, not more than a half dozen reported cases in all. No better demonstration of the practical working of this law could be asked for. The volume which we have selected as the subject of this review is an annotation of the draft of this law as adopted in New York. The annotations are by Mr. John C. Crawford, the one who drafted the law. Every section is carefully explained, and especially wherever it seems to override the common law or comes into a position of apparent conflict with constitutional provisions, state or federal. This volume will be practically indispensable to bankers and lawyers in all states which have adopted this law. Printed in one volume of 172 pages and bound in buckram. Published by Baker, Voorhis & Co., New York.

## BOOKS RECEIVED.

**A Treatise on Guaranty Insurance; including therein, as Subsidiary Branches the Law of Fidelity, Commercial, and Judicial Insurances, covering all Forms of Compensated Suretyship, such as Official and Private Fidelity Bonds, Building Bonds, Court Bonds, Credit and Title Insurances.** By Thomas Gold Frost, Ph. D., of the New York Bar. Boston: Little, Brown, and Company, 1902. Sheep, pp. 517. Price \$5.00. Review will follow.

**The Law of Void Judicial Sales, the Legal and Equitable Rights of Purchasers at Void Judicial, Execution and Probate Sales, and the Constitutionality of Special Legislation Validating Void Sales, and Authorizing Involuntary Sales in the Absence of Judicial Proceedings.** Fourth Edition. Revised, Enlarged and Brought Down to Date. By A. C. Freeman, Author of Treatises on "Judgments," "Executions," "Co-tenancy and Partition," etc. St. Louis: Central Law Journal Company, 1902. Sheep, pp. 341. Price \$4.00. Review will follow.

## JETSAM AND FLOTSAM.

## INQUEST ON A MUMMY.

It is not often that a mummy gets into the courts, but in the case of Aitken v. London & Northwestern Railway Co., before Mr. Justice Darling, of the King's Bench division, in London, there was a mummy in the case, and the facts are sufficiently interesting to bear permanent record. The action was brought to recover damages sustained by a mummy through the alleged negligence of the defendants' servants. Defendants denied negligence.

Mr. Kemp, K. C., and Mr. Carrington appeared for the plaintiff; while Mr. Lawless represented the defendants. Mr. Kemp, in opening the case for the plaintiff, said this was an extraordinary action; in fact, he had never heard of a similar action having been before the courts. The plaintiff was a lady who had traveled a great deal in South America, and especially in Peru. While she was traveling, her sons stayed at a religious establishment at Melle in Belgium, where there was a museum. The plaintiff was anxious to show the fathers that she appreciated their kindness to her sons, and she ascertained that they would like to secure a mummy for their museum. The plaintiff made an effort to obtain a mummy of one of the Incas, the royal family of Peru at the time when the Spanish took possession of the country. She had great difficulty in getting one, because the government prohibited the digging up of these ancient bodies. There was one, however, in the possession of Mr. Bradley, the British Consul at Iereca. Mr. Bradley would not sell his mummy, that of a female, but eventually he made the plaintiff a present of it. The mummy was packed, and, at the expense of forty-five pounds, plaintiff sent it to England by Captain Fox, of the steamship Gulf of Corcovada, in order that it might be forwarded on to Belgium. On arrival at Liverpool, the case containing the mummy was handed to the London & Northwestern Railway Company to be forwarded to its destination with all dispatch. When the case arrived in London it was mislaid. In the case in addition to the mummy, there were two ancient skulls and a piece of pottery. The case was opened in Lon-

don, and the man who opened it became frightened, and went off to the coroner, who, instead of treating it like a sensible man, held an inquest upon the mummy. Under the coroner's direction the jury found "that this woman was found dead at the railway goods station, Sun street, on the fifteenth day of April, and did die on some date unknown, in some foreign country, probably South America, from some cause unknown. No proofs of a violent death are found, and the body has been dried and buried in some foreign land, probably sun dried and cave-buried. The jurors are satisfied that this body does not show any recent crime in this country, and that deceased was unknown, and about twenty five years of age."

Mr. Justice Darling—Where do you say this inquest took place?

Mr. Kemp—in London.

Mr. Justice Darling—who was the coroner?

Mr. Kemp—Dr. Wynn-Westcott.

Mr. Justice Darling—and the jury found that verdict?

Mr. Kemp—Yes; a very intelligent jury. The mummy was between three hundred and four hundred years old. Unfortunately the mummy had been broken into pieces. After the inquest the defendants thought there was an opportunity of doing some business, and they demanded of the plaintiff the charge not for a mummy, but for a corpse. That demand, however, was not pressed, probably owing to the advice of the solicitor of the company. He (the learned counsel) submitted that the plaintiff was entitled to recover, not only the forty-five pounds she had expended, but the value of the mummy. Of course, it was difficult to assess the value of a mummy, but some witnesses would state that the destroyed mummy was worth between two hundred and three hundred pounds.

Mr. Justice Darling—I suppose the defendants are prepared to hand over the remains?

Mr. Lawless—they have been offered. They are buried in Belgium at the present moment. When the remains arrived in Belgium the police ordered them to be buried.

Mr. Kemp—I believe that is the fact. Continuing, the learned counsel submitted that the mummy was broken while in the custody of the defendants, who were thus liable.

Mr. Justice Darling—I suppose a mummy is goods?

Mr. Kemp said the defendants accepted the case as goods.

Mr. Justice Darling—I do not know much about mummies. Was this mummy in a case like the Egyptian mummies?

Mr. Kemp—No; they are not buried in the same way. The Incas were buried in a sitting posture.

Mrs. Aitken stated that she offered Mr. Bradley, the British vice-consul at Iereca, two hundred pounds for the mummy, but eventually he gave it to her. Altogether, however, she had spent one hundred and fifty pounds on it. Mr. Bradley, who was an authority, told her it was quite five hundreds years old. After the mummy had reached the Roman Catholic fathers at Melle, in Belgium, the chief of police had it buried in the public cemetery.

Mr. Lawless—You spoke of this being a mummy of the royal race of Incas. Did you get any pedigree with it? A. No.

Don't you know that the Incas were the race who peopled a whole district as the English race people England?

Mr. Justice Darling—But the English race people

only a portion of England. It is largely inhabited by foreigners.

Mr. Lawless (with an Irish accent)—I am afraid so, my Lord. I must plead guilty to that.

Dr. Hewett Oliver, who was employed by the railway company to examine the mummy, said it was a body with a "stuffy odor," and he recommended its removal to the mortuary. At the time he was called, he was told that the dead body of a woman had been found, but he came to the conclusion that it was only a mummy.

Mr. Kemp submitted that Mrs. Aitken was at least entitled to recover the money she had expended.

Mr. Justice Darling—Is there any property in a corpse?

Mr. Kemp—But I don't admit that this is a corpse.

Mr. Justice Darling—Then what is it?

Mr. Kemp—It is a mummy, which is a different thing altogether. A mummy ceases to be a corpse.

Mr. Justice Darling—When, Mr. Kemp?

Mr. Kemp—Before we get it, my lord.

Mr. Justice Darling—Is not a thing once a corpse always a corpse?

Mr. Kemp—No, my lord; but once a mummy always a mummy.

The jury awarded Mrs. Aitken seventy-five pounds, and judgment was entered accordingly.—*London News.*

#### HUMORS OF THE LAW.

A Washington lawyer recently appeared as counsel in a case before a justice of the peace, and found it necessary to make frequent objections to the evidence the opposing counsel was attempting to introduce. The justice looked first annoyed and then indignant at these frequent interruptions. Finally he could contain himself no longer, and roared out:

"What kind of a lawyer are you, anyway?"

"I am a patent lawyer," replied the attorney, with dignity.

"Well," retorted the justice, scornfully, "when the patent expires you will have a hard time getting it renewed. Go on with the case."

Old Friend—Was your daughter's marriage a success?

Hostess—Oh, a great success. She's traveling in Europe on the alimony.

Law students often give their professors and "coaches" curious answers. To the question: "What is the great essential to constitute burglary?" a student replied: "There must be breaking." The professor then said: "Then, if a man enters a door and takes a sovereign from your coat in the hall, of what crime is he guilty?" "Burglary," replied the student. "Burglary?" said the professor; "where is the breaking?" "It would break me, sir," said the student.

#### WEEKLY DIGEST.

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**1. ACCORD AND SATISFACTION—Waiver of Right of Appeal.** — The waiver of right to appeal from a judgment and the payment of a less sum is sufficient consideration for an agreement to accept such sum in full payment.—*Williams v. Blumenthal*, Wash., 67 Pac. Rep. 393.

**2. ADMIRALTY—A Contract to Can Fish.** —A contract to perform services as seaman and fisherman, and to assist in canning the fish taken, held maritime.—*Domenico v. Alaska Packers' Assn.*, U. S. D. C., N. D. Cal., 112 Fed. Rep. 554.

**3. ANIMALS—Fee of Stallion Service.** —Fee for service of stallion under contract insuring conception, held collectible, where the mare was traded during the period of gestation, though not known to be with foal.—*Pitchcock v. Donnanho*, Ark., 66 S. W. Rep. 145.

**4. APPEAL AND ERROR—Death of Defendant in Error.** —Where cause is reviewed in name of administrator of deceased defendant in error, no summons in error need be served.—*Link v. Reeves*, Neb., 88 N. W. Rep. 670.

**5. APPEAL AND ERROR—Erroneous Reasons Assigned.** —Though the chancellor, in distributing an assigned estate, has applied erroneous principles, yet, where he has reached the correct result, his judgment will not be disturbed.—*Shewmaker v. Yankey*, Ky., 63 S. W. Rep. 1.

**6. APPEAL AND ERROR—Misjoinder of Parties.** —A writ of error sued out by one of several defendants similarly interested, without joining the others, as authorized by 8 Starr & C. Ann. St. 1896, p. 3099, §50, will be dismissed.—*Cooke v. Cooke*, Ill., 62 N. E. Rep. 586.

**7. APPEAL AND ERROR—Presumption as to Instructions.** —It will be presumed, in the absence of a bill of exceptions, that an instruction correct in the abstract was applicable to the evidence.—*Meyers v. Menter*, Neb., 88 N. W. Rep. 662.

**8. APPEAL AND ERROR—Reversal for Wrong Assignment of Reason.** —A judgment will not be reversed because the court gave a wrong reason for rendition thereof.—*Kelley v. Wehn*, Neb., 88 N. W. Rep. 682.

**9. APPEAL AND ERROR—Reviewing Order Taxing Costs.** —Taxing costs rests largely in the discretion of the trial court, and its ruling in regard thereto will

not be revised, unless the record shows abuse of such discretion.—*Cox v. Patten, Tex.*, 66 S. W. Rep. 64.

10. APPEAL AND ERROR—Reviewing the Facts.—The practice of reviewing the findings on conflicting evidence in equity cases will not be extended to cases tried by referees, though the reference was compulsory.—*Smith v. Baer, Mo.*, 66 S. W. Rep. 166.

11. APPEAL AND ERROR—Second Appeal.—On remand by supreme court, after deciding all the issues but one with directions to try remaining issue, the decision on the other issues was the law of the case, and on the second appeal cannot be reviewed.—*Hill v. American Surety Co., Wis.*, 66 N. W. Rep. 642.

12. APPEAL AND ERROR—Special Findings.—A special finding inconsistent with the other findings and the judgment, and with the admissions contained in the pleadings, is not ground for reversal of the judgment.—*Machado v. Town of Santa Monica, Cal.*, 67 Pac. Rep. 331.

13. APPEAL AND ERROR—What May be Reviewed.—Order denying new trial and order denying petition on the ground of newly discovered evidence may both be reviewed in a single proceeding in error.—*German Nat. Bank v. Edwards, Neb.*, 66 N. W. Rep. 657.

14. ARBITRATION AND AWARD—Denying Liability.—Defendant, by denying liability under contract, held to waive any right to require arbitration under its terms.—*Mapes v. Metcalf, N. D.*, 66 N. W. Rep. 718.

15. ARBITRATION AND AWARD—Refusing to Consider Evidence.—Where arbitrators refuse to consider evidence in an action on an award, the award is vitiated.—*Caldwell v. Brooks Elevator Co., N. D.*, 66 N. W. Rep. 700.

16. ASSAULT—Assault with Intent to Kill.—A defendant cannot be convicted of an assault with an intent to commit murder, unless the assault was made with the specific intent to take life.—*People v. Mendenhall, Cal.*, 67 Pac. Rep. 325.

17. ASSIGNMENTS—Contract to Draw Plans.—County held not entitled to object to the transfer of a contract for the drawing of plans for a court house on the ground that the contract was one of trust and confidence.—*Weatherhogg v. Board of Comr. of Jasper County, Ind.*, 62 N. E. Rep. 477.

18. ASSIGNMENTS—Part of Claim.—Where only a part of a claim for breach of warranty is assigned, assignee must seek recovery in equity.—*McConaughay v. Bennett's Exrs., W. Va.*, 66 S. E. Rep. 540.

19. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Distribution.—In distributing an assigned estate, the court will not marshal securities, where it will prejudice general creditors to do so.—*Shewmaker v. Yankey, Ky.*, 66 S. W. Rep. 1.

20. ATTORNEY AND CLIENT—Collecting Judgment.—Judgment plaintiff held entitled to an injunction restraining her attorney from collecting the judgment, though he had a lien thereon for a reasonable fee.—*O'Neal v. Spalding, Ky.*, 66 Pac. Rep. 11.

21. ATTORNEY AND CLIENT—Employing Assistant Counsel.—Where defendants contracted with an attorney, and he employed plaintiffs to assist him, defendants believing that such attorney alone was responsible for plaintiffs' fees, held not responsible therefor.—*McCarthy v. Crump, Colo.*, 67 Pac. Rep. 848.

22. BANKRUPTCY—Fraudulent Transfers.—A sale of property by an insolvent for a full consideration, which is paid in cash, is not a fraudulent transfer which constitutes an act of bankruptcy, because the proceeds are used by the seller to prefer some creditors over others, even though such was his intention when the sale was made.—*Githens v. Shifler, U. S. D. C., M. D., Penn.*, 112 Fed. Rep. 505.

23. BANKRUPTCY—Jurisdiction Over Exempt Property.—Title of exempt property held to remain in bankrupt, and, when set aside as exempt, to be subject

to jurisdiction of the state, and not the federal court.—*Powers Dry Goods Co. v. Nelson, N. Dak.*, 66 N. W. Rep. 703.

24. BANKRUPTCY—Preferences.—Where creditors of an insolvent have obtained a preference by purchasing his goods at less than half the cost, his trustee in bankruptcy afterwards appointed may recover the value so received by them under Bankr. Act, § 606, without first restoring the consideration paid by them.—*Stern v. Louisville Trust Co., U. S. C. C. of App.*, Sixth Circuit, 112 Fed. Rep. 501.

25. BANKRUPTCY—Sale of Realty Under Execution.—Under Bankr. Act 1898, § 677, a sale of realty under execution issued less than four months prior to the time when the execution defendant is declared a bankrupt will not be avoided at the suit of a former grantee.—*Hutchins v. Cantu, Tex.*, 66 S. W. Rep. 138.

26. BANKS AND BANKING—Application of Deposit.—A bank may apply a deposit to the payment of a debt against a firm of which the depositor is a member, or, when sued, may plead the firm debt as a set off.—*Owsley v. Bank of Cumberland, Ky.*, 66 S. W. Rep. 331.

27. BANKS AND BANKING—Slander of Credit by Refusing to Recognize Check.—An allegation that plaintiffs had money on deposit in defendant bank, including money belonging to their customers, and that they demanded such money and were refused, does not state a cause of action for slander to their credit.—*Hanna v. Drovers' Nat. Bank, Ill.*, 62 N. E. Rep. 556.

28. BILLS AND NOTES—Denying Execution.—Where the note on which suit is brought is set out in the complaint, and defendant does not deny its execution on oath, no proof thereof is required, other than the note itself.—*McDonald v. Hare, Ind.*, 62 N. E. Rep. 501.

29. BILLS AND NOTES—Enforcing Check Given in Gambling Transaction.—The rule that courts will leave parties to prohibited transactions where their acts have placed them held not to prevent payee of check indorsed in gambling transaction from enforcing payment against the maker.—*Drinkall v. Movius State Bank, N. Dak.*, 66 N. W. Rep. 724.

30. BUILDING AND LOAN ASSOCIATIONS—Competitive Bidding.—Loans by a building association must be open to competitive bidding.—*South Omaha Loan & Building Assn. v. Werrick, Neb.*, 66 S. W. Rep. 694.

31. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—Where building and loan association is insolvent, it can recover from borrowing member amount loaned, with interest, less amount paid as interest and premium.—*Anselme v. American Savings & Loan Assn., Neb.*, 66 N. W. Rep. 665.

32. BUILDING AND LOAN ASSOCIATION—Scheme to Cover Usurious Interest.—Where the exactation of monthly payments on stock in a building association is part of a scheme to cover usurious interest on the loan, the full monthly payments will be applied on the principal of the loan, and not their withdrawal value merely.—*American Mut. Bidg. & Sav. Assn. v. Daugherty, Tex.*, 66 S. W. Rep. 181.

33. CANCELLATION OF INSTRUMENTS—Void Instrument.—A court of equity has jurisdiction to order the cancellation of a deed, though it is void on its face.—*Morton v. Morris, Tex.*, 66 S. W. Rep. 94.

34. CARRIERS—Failing to Stop.—In an action for injuries sustained by plaintiff on jumping from a moving train, he having been aboard the train to seat his wife, held proper to permit witness to testify that the train did not stop long enough to enable one who had bought a ticket for it to get on.—*Texas & Pac. Ry. Co. v. Crockett, Tex.*, 66 S. W. Rep. 114.

35. CARRIERS—Insulting Language of Conductor.—In an action against a railroad company, based on insulting and humiliating language of a conductor to a passenger, held immaterial that the conductor did not

intend to charge the passenger with dishonesty.—*Texas & Pac. Ry. Co. v. Tarkington*, Tex., 66 S. W. Rep. 187.

38. CARRIERS—Unloading Stock.—Where the shipper undertakes to care for the stock, and to load and unload it, the burden of proof is on him to show that any injury was the result of the carrier's negligence.—*Louisville & N. R. Co. v. Harned*, Ky., 66 S. W. Rep. 25.

39. COMMERCE—What Discrimination is Illegal.—Actual discrimination in rates charged is necessary to constitute a violation of the interstate commerce act, and the mere making or offering of a discriminating rate, under which it is not shown that any shipment was ever made, constitutes no legal injury to a shipper who is charged a higher rate.—*Lehigh Val. R. Co. v. Rainey*, U. S. C. C., E. D. Pa., 112 Fed. Rep. 487.

38. CONFLICT OF LAWS—Place of Contract.—Contracts with residents of Nebraska, made in the state by a foreign building association, held Nebraska contracts to be governed by the laws of the state.—*People's Building, Loan & Savings Association v. Shaffer*, Neb., 88 N. W. Rep. 689.

39. CONSPIRACY—Blacklisting Employees.—Laws 1895, ch. 174, relating to blacklisting of employees, held not a violation of the state or federal constitution.—State v. Justus, Minn., 88 N. W. Rep. 759.

40. CONSPIRACY—Compelling Employer to Raise Wages.—The fact that an employer, on the refusal of employees to perform their contract for services, is compelled to make a new agreement to pay higher wages for the same services, because, under the circumstances, to refuse would subject him to greater loss, does not constitute duress which invalidates such agreement.—*Domenico v. Alaska Packer's Association*, U. S. C. C., N. D. Cal., 112 Fed. Rep. 554.

41. CONTRACTS—Waiving Illegality.—A party to a contract void as against public policy cannot waive its illegality, by a failure to specially plead the defense or otherwise.—*Reed v. Johnson*, Wash., 67 Pac. Rep. 381.

42. CORPORATIONS—Appointment of Receiver.—A court of equity will appoint a receiver for a corporation at suit of minority stockholders only where a clear case of right is shown and a pressing necessity.—*Taylor v. Decatur Mineral & Land Co.*, U. S. C. C., N. D. Ala., 112 Fed. Rep. 449.

43. CORPORATIONS—Conflict in Names.—The name "International Committee of the Young Women's Christian Association" held so nearly identical with "Young Women's Christian Association" as to entitle the latter organization to restrain the former from using such name.—*International Committee Young Women's Christian Association v. Young Women's Christian Association of Chicago*, Ill., 62 N. E. Rep. 551.

44. COSTS—Objections.—A plaintiff, who submitted without objection to the ruling of the lower court under Rev. St. §§ 1425-1438, adjudging him to pay costs, and who paid such costs, held to have waived all objection thereto.—*Cox v. Patten*, Tex., 66 S. W. Rep. 64.

45. COSTS—Plea in Abatement.—Where an action is brought for the same cause for which another was dismissed voluntarily, and the costs of the former action have not been paid, a plea in abatement by defendant will be deemed a motion to stay the proceedings until such costs shall be paid.—*Hipes v. Griner*, Ind., 62 N. E. Rep. 500.

46. COSTS—Reapportionment of Costs on Reversal.—The reversal of a decree foreclosing a mortgage, and its remand to make it correspond to a master's report, held not to authorize an apportionment of costs; the decree being affirmed on all material issues.—*Komberg v. McCormick*, Ill., 62 N. E. Rep. 537.

47. COUNTERFEITING—Securities of the United States.—An indictment for having in possession with intent to sell or use an obligation or security engraved and printed after the similitude of an obligation or secur-

ity of the United States does not state an offense, when it shows on its face that the instrument on which it is based is a bill purporting to have been issued by a bank, and not by the government.—*United States v. Pitts*, U. S. D. C., N. D. Cal., 112 Fed. Rep. 522.

48. COUNTIES—Compensation for Supplies.—A person furnishing supplies, etc., to a county under a statute authorizing the purchase thereof, held entitled to compensation therefor, though no provision for payment is made by the statute.—*Board of Commissioners of San Juan County v. Tully*, Colo., 67 Pac. Rep. 346.

49. COUNTIES—Delinquent Fees.—Under Sayles' Civ. St. art. 2495f, a county treasurer has no right to collect delinquent fees after the expiration of his term of office.—*Ellis County v. Thompson*, Tex., 66 S. W. Rep. 48.

50. COVENANTS—Eviction Where Party Holds at Time of Warranty.—Where, at the time a covenant of warranty is made, third party holds the land under paramount title, there is an eviction.—*McCormaghey v. Bennett's Executors*, W. Va., 40 S. E. Rep. 540.

51. CRIMINAL EVIDENCE—Admissions.—Where warden of penitentiary does not intimate any benefit from admission of guilt, a confession to him held admissible.—*Strong v. State*, Neb., 88 N. W. Rep. 772.

52. CRIMINAL LAW—Former Jeopardy Where Acquittal was Collusive.—Acquittal of defendant in collusive trial before justice held no bar to an indictment for the same offense.—*State v. Caldwell*, Ark., 66 S. W. Rep. 150.

53. CRIMINAL LAW—Right to Move for New Trial.—The right of a defendant to move for a new trial, and to have his motion considered, if timely, is absolute, and a denial of such right by a federal court, not being a matter of discretion, is reviewable on writ of error.—*Ogden v. United States*, U. S. C. C. of App., Third Circuit, 112 Fed. Rep. 523.

54. CRIMINAL TRIAL—Special Counsel.—Special counsel may aid in prosecution.—*State v. Hoshor*, Wash., 67 Pac. Rep. 386.

55. DAMAGES—Element of Pregnancy.—Allegations in a complaint for personal injuries held to permit proof that plaintiff was pregnant at time of accident and subsequently had a miscarriage.—*Clukey v. Seattle Electric Co.*, Wash., 67 Pac. Rep. 379.

56. DAMAGES—Mental Suffering.—In an action for breach of a contract to furnish plaintiff medical attention, damages for mental and physical suffering are recoverable.—*Galveston, H. & S. A. Ry. Co. v. Rubio*, Tex., 65 S. W. Rep. 1126.

57. DEATH—Limitations.—The fact that the widow of a person killed by the negligence of another and his only child were both infants at the time of his death did not extend the period of limitation beyond one year from the death.—*Van Vactor's Administratrix v. Louisville & N. R. Co.*, Ky., 66 S. W. Rep. 4.

58. DEATH—Resulting from Injuries.—Where one sustains injuries of which he dies several hours later, a right of action for the injuries exists in favor of the deceased, which survives to his personal representatives, and the statute does not give a right of action to such representatives for the death.—*Jones v. McMillan*, Mich., 88 N. W. Rep. 206.

59. DECEDENTS—Deducting Advancements.—An advancement to a child should be deducted in determining the interest of the child which may be subjected to judgment against him after the death of his ancestor.—*Spaan v. Anderson*, Iowa, 88 N. W. Rep. 200.

60. DEDICATION—Change in Designation of Sites.—Where the owners of land in a city platted it, and the plat designated a certain lot as a "hotel site," held not to render such lot incapable of being put to any other use.—*Hanes v. West End Hotel & Land Co.*, N. Car., 40 S. E. Rep. 114.

61. DEDICATION—Essentials.—It is essential to a dedication that there should be an offer to dedicate and

an acceptance on the part of the public.—*City of Anaheim v. Langenberger*, Cal., 66 Pac. Rep. 855.

62. **DEPOSITIONS—Given Before Death.**—A grantor's depositions held admissible in an action for the recovery of land brought by him and revived by his heirs after his death.—*Cummings v. Moore*, Tex., 66 S. W. Rep. 1113.

63. **DEEDS—Complete Execution.**—A conveyance completely executed will be upheld as against the grantor or his heirs, though not supported by a valuable consideration.—*Neurenberger v. Lehenbauer*, Ky., 66 S. W. Rep. 15.

64. **DEEDS—Delivery to Minor.**—The delivery of a deed to a minor is not ineffectual by reason of minority alone.—*McNear v. Williamson*, Mo., 66 S. W. Rep. 160.

65. **DISTRICT AND PROSECUTING ATTORNEYS—Taking Bribe.**—A commonwealth's attorney, who takes a bribe to dismiss an indictment, may, at the option of the commonwealth, be indicted either for malfeasance in office, or, under Ky. St. § 1866, for the offense of taking a bribe.—*Commonwealth v. Rowe*, Ky., 66 S. W. Rep. 29.

66. **DIVORCE—Attorney's Fees.**—Attorney's fees are not recoverable by a divorced wife in an action by her against her former husband for expenses incurred in the maintenance of their minor children.—*Ditmar v. Ditmar*, Wash., 67 Pac. Rep. 353.

67. **DIVORCE—Recovery of Alimony from Husband's Estate.**—Where a decree of divorce awards the custody of a child to the wife, and requires a payment by the husband for its support, but does not make such allowance a lien on his property, such allowance ceases on his dying testate, leaving such child sole legatee.—*Schultze v. Schultze*, Tex., 66 S. W. Rep. 56.

68. **DRUGGISTS—Physician as Druggist Without Registration.**—While a regular physician may sell drugs to his own patients, he is subject to the penalty prescribed if, not being a registered pharmacist, he fills prescriptions sent to him by others.—*Commonwealth v. Hovious*, Ky., 66 S. W. Rep. 3.

69. **ELECTIONS—Failure to Record Votes.**—The failure of the town clerk, as required, to record the votes cast for the various candidates at an election, does not invalidate the election, as it is within his power to amend the record to show such facts.—*Wheeler v. Carter*, Mass., 62 N. E. Rep. 47.

70. **ELECTRICITY—Liability for Death Due to Lack of Care.**—Persons dealing with electricity, and failing to exercise proper care to see that their plant is properly constructed, are liable for death resulting therefrom, though the plant itself is operated by their employees.—*Cole v. Parker*, Tex., 66 S. W. Rep. 135.

71. **EMBEZZLEMENT—By Agent.**—Money, though wrongfully obtained by the principal, may be embezzled by the agent.—*State v. Hoshor*, Wash., 67 Pac. Rep. 366.

72. **ESTOPPEL—To Attack Corporate Capacity.**—Where a school district had borrowed money from the state for the erection of a building, and had issued bonds for the loan, the state is estopped to attack its corporate capacity.—*State v. School Dist. No. 108*, Dakota County, Minn., 66 N. W. Rep. 751.

73. **EVIDENCE—Affecting Deeds.**—Parol testimony is admissible, not only to disprove the consideration recited in a deed, but to show the true consideration.—*Neurenberger v. Lehenbauer*, Ky., 66 S. W. Rep. 15.

74. **EVIDENCE—Declaration of Partners.**—Declarations of plaintiff's partner, while in possession of goods which they claimed to own as partners, as to the real ownership of the goods, were admissible against plaintiff.—*Ruddy v. Katz*, Ky., 66 S. W. Rep. 18.

75. **EVIDENCE—Judicial Notice.**—Courts will take judicial cognizance that potatoes, sugar beets, and turnips are not the spontaneous products of the soil.—*Meyers v. Menter*, Neb., 66 N. W. Rep. 662.

76. **EVIDENCE—Speed of Street Car.**—The speed of a street car is not a question for expert testimony, and any witness who saw the car may state his opinion as to the speed at which it was going; its weight being a matter for the jury, under all the facts shown.—*Robinson v. Louisville Ry. Co.*, U. S. C. C. of App., Sixth Circuit, 112 Fed. Rep. 484.

77. **EXCEPTIONS, BILL OF—Date of Filing.**—Under Ky. St. § 1016, where a motion for a new trial was overruled December 10th, a bill of exceptions tendered February 13th was too late; there having been no extension of time.—*City of Covington v. Wilson*, Ky., 66 S. W. Rep. 8.

78. **EXCEPTIONS, BILL OF—Date of Filing.**—Where an order of reference was entered November 9, 1905, during the October term, and no bill of exceptions was filed during that term, a bill filed during the April term, 1906, was unavailable to save the exceptions.—*Smith v. Baer*, Mo., 66 S. W. Rep. 166.

79. **EXECUTION.**—That a third person had a lien on the corporate stock, or that the stockholders had agreed to pool their stock, held not to prevent sale of the stock under execution against the owner, as provided by Ballinger's Ann. Codes & St. §§ 5893, 5406, et seq.—*Hardin v. White Swan Min. & Mill. Co.*, Wash., 67 Pac. Rep. 236.

80. **EXECUTION—Record of Levy.**—A levy of an execution on realty is not invalid because the sheriff makes no record thereof on the records of his office.—*Jones v. Olson*, Colo., 67 Pac. Rep. 349.

81. **EXECUTORS AND ADMINISTRATORS—Extraterritorial Enforcement.**—Judgment against administrator cannot be enforced by action beyond limits of state in which it was rendered.—*Burton v. Williams*, Neb., 88 N. W. Rep. 765.

82. **EXEMPTIONS—Who is Head of Family.**—Where wife is compelled to maintain family, she is the head thereof for the purpose of claiming exemptions.—*Ness v. Jones*, N. Dak., 68 N. W. Rep. 706.

83. **FIRE INSURANCE—Appraisal.**—Insurer cannot postpone its demand for an appraisal until insured has been led by its acts to dispose of the property, so that an appraisal cannot be had.—*Chainless Cycle Mfg. Co. v. Security Ins. Co.*, N. Y., 62 N. E. Rep. 392.

84. **FIRE INSURANCE—Waiver of Forfeiture.**—Forfeiture of policy is waived when insurer, on knowledge of the facts, continues to treat the contract as binding.—*Hartford Fire Ins. Co. v. Landfare*, Neb., 88 N. W. Rep. 779.

85. **FISH—Right to Establish Fishery.**—Where parties both having a fish license appeared on the same location on the same day to locate a fishery, the plaintiff having been first in time and having given defendant due notice, followed by due diligence in making the location, held entitled thereto.—*Elwood v. Dickinson*, Wash., 67 Pac. Rep. 370.

86. **FAUDS, STATUTE OF—Agreement to Establish Private Way.**—Oral agreement to establish a private way, executed by part performance, will be enforced in equity, though against the statute of frauds.—*Hay v. Knauth*, N. Y., 62 N. E. Rep. 395.

87. **FAUDS, STATUTE OF—Extending Time of Redemption.**—An agreement extending the time in which a mortgagor may redeem from a foreclosure sale, though oral and not supported by any new consideration, held not within the statute of frauds.—*Turpie v. Lowe*, Ind., 62 N. E. Rep. 484.

88. **GARNISHMENT—Amount Due on Building Contracts.**—A balance to become due on an uncompleted building contract, indivisible in its nature, is not subject to garnishment.—*Medley v. American Radiator Co.*, Tex., 66 S. W. Rep. 86.

89. **GIFTS—Evidence.**—Evidence that a donor had no children or parents to provide for was admissible as having some bearing on the probability of the gift.—*Russell v. Langford*, Cal., 67 Pac. Rep. 331.

90. **GUARANTY—When Released by Surrender.**—A

guarantor, of a note, given to a bank as collateral security for notes discounted by the bank for the principal, held discharged by a surrender of such notes by the bank and the acceptance of others in their stead.—*Pennsylvania Trust Co. v. McElroy*, U. S. C. C. of App., Third Circuit, 112 Fed. Rep. 509.

91. HOMESTEAD—Mortgage Before Declaration of Homestead.—A mortgage of the homestead by the husband is valid as against the claims of the wife therein, where the declaration of homestead is not filed until after it is executed.—*Loewenthal v. Coonan*, Cal., 67 Pac. Rep. 324.

92. HOMESTEAD—Oral Agreements.—Oral agreement between son and his parents that on their death he should be vested with title of homestead held void.—*Teske v. Pittsner*, Neb., 88 N. W. Rep. 658.

93. HOMESTEAD—Rented.—A house rented out by the debtor is not exempt as part of the homestead, though standing on the lot with the debtor's residence, and though the value of both houses does not exceed \$1,000.—*Garrison v. Penn*, Ky., 66 S. W. Rep. 14.

94. HUSBAND AND WIFE—Conveyance to Husband.—Under the statute of Texas defining the powers of married women, deeds executed to convey a wife's separate property through a trustee to the husband, to be held as community property, are void.—*Kellett v. Trice*, Tex., 66 S. W. Rep. 51.

95. HUSBAND AND WIFE—Where Husband Runs Business for Wife.—Where the wife's success in business was due to the skill of her husband as her agent, real estate purchased with the profits of the business was subject to the husband's debts.—*Blackburn v. Thompson*, Ky., 66 S. W. Rep. 5.

96. INJUNCTION—Pendente Lite.—Injunction pendente lite on appeal, on motion of appellant, denied where, in effect, it in no way altered the judgment appealed from.—*Baltimore & O. R. Co. v. Wabash R. Co.*, Ind., 62 N. E. Rep. 520.

97. INJUNCTION—Revival on Death of Plaintiff.—Where plaintiff in action in which interlocutory injunction has been granted dies, and it is not revived, after order of dismissal, suit on bond may be maintained.—*Humphfeldt v. Moles*, Neb., 88 N. W. Rep. 655.

98. INSOLVENCY—Preference.—An insolvent corporation cannot prefer a debt on which directors were bound as sureties.—*Williams v. Turner*, Neb., 88 N. W. Rep. 668.

99. INSURANCE—Authority of Agent.—A marine insurance broker is not the agent of an underwriter from whom he procures a policy for a client, in such sense that the latter is bound by notice to the broker that the insurance was in fact procured for the benefit of another than the one whose name was signed to the application.—*Mannheim Ins. Co. v. Hollander*, U. S. D. C., S. D. N. Y., 112 Fed. Rep. 549.

100. INTOXICATING LIQUORS—Suburban Districts.—Under Burns' Rev. St. 1901, § 3541, a city may prohibit the sale of liquor in suburban districts, though such districts are used for business purposes.—*Rowland v. City of Greencastle*, Ind., 62 N. E. Rep. 474.

101. IRRIGATION—Mandamus to Compel Sale of Water.—Where an applicant for water under Irrigation Act Feb. 25, 1899, has performed all the duties required of him, and the company has unsold water, mandamus will lie to compel sale to petitioner.—*Bardsley v. Boise City Irrigation & Land Co.*, Idaho, 67 Pac. Rep. 428.

102. JUDGMENT—Consent Decree.—The court, in a decree carrying into execution a consent decree, may construe the same, but cannot set it aside and enter a different decree.—*Seller v. Union Mfg. Co.*, W. Va., 40 S. E. Rep. 547.

103. JUDGMENT—Effect of Lien.—Lien of a judgment on land gives only a right to levy, and is not an estate or interest in land.—*State v. District Court of Chippewa County*, Minn., 88 N. W. Rep. 755.

104. JUDGMENT—Enforcement of Foreign Judgment

—Where, in an action to recover on a judgment of a sister state, defendant in a cross complaint alleges facts which show want of jurisdiction to render the judgment, it is error to strike out such pleading.—*Anthony v. Masters*, Ind., 62 N. E. Rep. 605.

105. JUDGMENT—Res Judicata.—Where the subject-matter of a suit and the terms of a sale in issue differ from the subject-matter and terms of a sale involved in a subsequent suit, the decree in the former is not res judicata, though the parties are the same in both suits.—*Morton v. Morris*, Tex., 66 S. W. Rep. 94.

106. JUDGMENT—Unborn Parties.—A decree entered in a suit in which a trustee, representing a contingent estate of persons unborn, and the persons in being having vested estates, were before the court, held binding upon such persons unborn at the date of the suit and decree therein.—*Perkins v. Burlington Land & Improvement Co.*, Wis., 88 N. W. Rep. 648.

107. JURY—Incompetency.—In order to render juror incompetent, it is not necessary that his scruples against the infliction of capital punishment should be such as to forbid him under any circumstances from rendering a verdict inflicting death penalty.—*Rhea v. State*, Neb., 88 N. W. Rep. 789.

108. JUSTICES OF THE PEACE—Relying on Justice.—One learned in the law is not justified in relying on conclusion of justice as to the time an appeal bond should be filed.—*People's Building, Loan & Saving Association v. Cook*, Neb., 88 N. W. Rep. 768.

109. LANDLORD AND TENANT—Assignment of Lease.—Assignment of a lease held to make assignee liable for rent after the termination of the relation of lessor and lessee by further assignment.—*Springer v. De Wolf*, Ill., 62 N. E. Rep. 542.

110. LANDLORD AND TENANT—Consent to Tenant's Subletting.—The fact that a landlord has consented that his tenant may sublet the premises does not render him liable for a breach by the tenant of his contract.—*Purdom v. Brussels*, Ky., 66 S. W. Rep. 22.

111. LANDLORD AND TENANT—Defective Stairway.—In an action by a tenant for injuries caused by a defective railing to a stairway, the question as to whether plaintiff was making proper use of the stairway when hurt held to be for the jury.—*McGinley v. Alliance Trust Co.*, Mo., 66 S. W. Rep. 158.

112. LANDLORD AND TENANT—Repairs.—Under Laws 1896, ch. 547, § 197, a tenant covenanting to make "inside and outside repairs" may surrender the premises when rendered untenable by a severe storm.—*May v. Gillis*, N. Y., 62 N. E. Rep. 355.

113. LIFE INSURANCE—Misstatements.—Statements not amounting to fraud or mistake by an insurance agent during the negotiations for a policy are not available to vary terms of a written contract subsequently entered into.—*Wells v. Vermont Life Ins. Co.*, Ind., 62 N. E. Rep. 501.

114. LIFE INSURANCE—Suicide Clause.—Condition in life policy that, if insured dies by suicide within three years, liability of insurer should be limited to premiums paid, held valid.—*Scherar v. Prudential Ins. Co.*, Neb., 88 N. W. Rep. 687.

115. LIFE INSURANCE—Suicide Clause.—Under a policy providing that it shall be void if the insured "die by his own act, sane or insane," there can be no recovery if insured took his life, when he had mind enough to know that his act would probably result in his death.—*Manhattan Life Ins. Co. v. Beard*, Ky., 66 S. W. Rep. 35.

116. LIFE INSURANCE—Where Beneficiary and Insurer Perish in a Common Disaster.—Where a life policy provided that it should be payable to a certain beneficiary, if living, otherwise to the executors of the insured, in a suit by the administrator of the beneficiary against the insurance company and the administrator of insured, the burden was on plaintiff to show that his decedent had survived the insured.—*Hildebrandt v. Ames*, Tex., 66 S. W. Rep. 128.

117. LIMITATION OF ACTIONS—Absence of Defendant

from State.—In a suit for reimbursement by a surety who did not pay the debt until after his principal had become a resident of another state, the absence of the principal from the state of Texas held not to suspend the statute of limitations.—*Haberman v. Heidrich, Tex.*, 68 S. W. Rep. 106.

118. **LIMITATION OF ACTIONS—Action by Surety on Note to Foreclose.**—An action by a surety on a note to foreclose a mortgage given him by his principal to secure him accrues when he pays the note, and not at the date of the note.—*Loewenthal v. Coonan, Cal.*, 67 Pac. Rep. 324.

119. **LIMITATION OF ACTIONS—Promise of Payment.**—Though written order for goods specifies price and contains a promise of payment, but is not filled as made, a partial acceptance constitutes a new offer, and is not an offer in writing, within Code Civ. Proc. § 11.—*Kingman v. Davis, Neb.*, 88 N. W. Rep. 777.

120. **MANDAMUS—For Salary Due—Issuing of warrant for salary due and payable will be compelled by mandamus, unless the facts show a well founded doubt as to the validity of the demand.**—*State v. Albright, N. D. C.*, 88 N. W. Rep. 729.

121. **MANDAMUS—To Settle Bill of Exceptions.**—*Mandamus* lies to compel judge to settle bill of exceptions.—*State v. Fawcett, Neb.*, 88 N. W. Rep. 681.

122. **MASTER AND SERVANT—Assumption of Risk.**—Telephone lineman, charged by employment with duty of inspecting and repairing lines, held to thereby assume risk arising from defective cross-arm.—*Roberts v. Missouri & K. Tel. Co., Mo.*, 68 S. W. Rep. 155.

123. **MASTER AND SERVANT—Assumption of Risk.**—The danger from overhanging limbs of trees is not one of the dangers incident to the service of railway employees, whose duties require them to be on the tops of cars while in motion.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Parish, Ind.*, 62 N. E. Rep. 514.

124. **MINES AND MINING—Liability of Mine Owners to Furnish Props.**—*Burns' Rev. St. 1901, §§ 7447, 7466, 7472, 7473*, making mine owners liable in damages for failure to provide sufficient props for their mines and to keep such mines safely propped, held not class legislation.—*D. H. Davis Coal Co. v. Poland, Ind.*, 62 N. E. Rep. 492.

125. **MORTGAGES—Appointment of New Trustee.**—The appointment of a new trustee by the beneficiary held void, in the absence of the happening of the conditions specified in the deed as authorizing such appointment.—*McNeill v. Lee, Miss.*, 30 South. Rep. 821.

126. **MORTGAGES—Assignment of Note.**—The assignment of a note secured by a mortgage gives the assignee the protection of the security as an equitable incident to the debt evidenced by the note, though the mortgage is not assignable.—*Romberg v. McCormick, Ill.*, 62 N. E. Rep. 537.

127. **MORTGAGES—Date of Rendering Decree.**—A sale will not be vacated because order does not correctly state the date decree was rendered.—*Mead v. Hoover, Neb.*, 88 N. W. Rep. 655.

128. **MORTGAGES—Excessive Decree on Foreclosure.**—Where amount of decree in foreclosure is excessive, the remedy is by appeal or appropriate proceedings in trial court.—*Beck v. McKibben, Neb.*, 88 N. W. Rep. 765.

129. **MORTGAGES—Fee of Master to Approve Decree.**—In an action to foreclose a trust deed, where there is no statute requiring the master to approve the decree, and it does not appear that he did approve it, it is error to tax and enter a fee to the master for approving the decree.—*Roby v. Chicago Title & Trust Co., Ill.*, 62 N. E. Rep. 544.

130. **MORTGAGES—Fraudulent Foreclosure.**—Where a trust deed is fraudulently foreclosed without the knowledge of the owner of the debt, a purchaser with full knowledge acquires no right to the premises as against such owner.—*Cheney v. Murto, Colo.*, 67 Pac. Rep. 340.

131. **MORTGAGES—Proof on Foreclosure.**—On foreclosure, plaintiff must show that no proceeding at law has been had to recover the debt.—*Woolworth v. Sater, Neb.*, 88 N. W. Rep. 682.

132. **MORTGAGES—Time to Redeem.**—Where a contract extending the time in which a mortgagor may redeem under a mortgage foreclosure sale does not fix the time, the mortgagor must redeem within a reasonable time.—*Turpie v. Lowe, Ind.*, 62 N. E. Rep. 484.

133. **MORTGAGES—Where Heirs are Not Made Parties to Foreclosure.**—Heirs of a mortgagor, not parties to foreclosure instituted after his decease, are not required to tender their share of the debt before suing the purchaser for their interest in the property.—*Anrud v. Scandinavian American Bank, Wash.*, 67 Pac. Rep. 364.

134. **MUNICIPAL CORPORATIONS—Apportionment of Cost of Improvements.**—An act seeking a new apportionment for the cost of a street improvement is barred after five years from the time the first apportionment was made.—*Gleason's Admr. v. Peter & Brigham Stone Co., Ky.*, 68 S. W. Rep. 16.

135. **MUNICIPAL CORPORATIONS—Assessment for Construction of Union Depot.**—The construction of a union depot and the improvement of a street as authorized by St. 1896, ch. 516, held to be a public improvement, authorizing a special assessment based on benefits derived from the entire improvement.—*Sears v. Board of Street Comrs. of City of Boston, Mass.*, 62 N. E. Rep. 397.

136. **MUNICIPAL CORPORATIONS—Monopoly as a Defense.**—Evidence of a monopoly and control of material by the bidders held to constitute no defense to proceedings for the collection of a special assessment.—*Givens v. People, Ill.*, 62 N. E. Rep. 584.

137. **MUNICIPAL CORPORATIONS—Obstructions.**—A city having exclusive power over its streets cannot escape responsibility when it authorizes obstructions for private purposes.—*Miechke v. City of Seattle, Wash.*, 67 Pac. Rep. 357.

138. **MUNICIPAL CORPORATIONS—Tearing Down Infected Hospital.**—Where a city employed one to assist in tearing down a smallpox hospital without warning him of danger of infection or taking precautions against the same, the city is not liable for his death owing to smallpox.—*Nicholson v. City of Detroit, Mich.*, 88 N. W. Rep. 695.

139. **NEGLIGENCE—Contributory Negligence of Child.**—Boy injured by running across ties, and struck by train, held guilty of contributory negligence.—*Fezler v. Willmar & S. F. Ry. Co., Minn.*, 88 N. W. Rep. 746.

140. **NEGLIGENCE—Flight of Horse from Explosives.**—Where plaintiff was injured at a celebration where he knew fireworks were to be discharged, by his horse running away, held, he could not recover.—*Frost v. Josselyn, Mass.*, 62 N. E. Rep. 469.

141. **NEW TRIAL—Cumulative Evidence.**—Newly-discovered cumulative evidence held ground for new trial, where it would probably have changed the result.—*German Nat. Bank v. Edwards, Neb.*, 88 N. W. Rep. 657.

142. **NEW TRIAL—Ground.**—Gen. Laws 1901, ch. 113, does not permit attorneys after trial to assign isolated portions of charge as errors and secure new trial for technical defects or unintentional misstatements.—*Steinbauer v. Stone, Minn.*, 88 N. W. Rep. 754.

143. **NUISANCE—Abating Nuisance Authorized by City.**—A contract between the county and city authorizing the county to erect the posts does not estop the city from abating the nuisance, where population has increased since the contract was made.—*Mercer County v. City of Harrodsburg, Ky.*, 68 S. W. Rep. 16.

144. **PARTNERSHIP—Duration.**—Where a partnership agreement does not limit the duration of the partnership, it is not error to instruct that it will be presumed to continue until there is competent proof of its

continuance or dissolution.—*Carstens v. Eggers*, Wash., 67 Pac. Rep. 404.

145. PAYMENTS—Voluntary Payments.—Doctrine of voluntary payments does not apply to payments made from public funds.—*Wiles v. McIntosh County, N. Dak.*, 88 N. W. Rep. 710.

146. PLEADING—Amended Complaints.—Where an amended complaint has been filed, there can be no available error in ruling on a demurrer to the original complaint or in striking out an answer thereto.—*Anthony v. Masters*, Ind., 62 N. E. Rep. 505.

147. PLEADING—Argumentativeness.—The remedy for argumentativeness in a pleading is by motion, and not by a demurrer.—*Missouri Pac. Ry. Co. v. Hemmingway*, Neb., 88 N. W. Rep. 678.

148. PRINCIPAL AND AGENT—Exceeding Authority.—Where an attorney in fact exceeds his authority in making a sale of real estate, the vendee cannot recover of the vendor money paid to the agent in carrying out the sale; the vendor not having received such money.—*Morton v. Morris*, Tex., 66 S. W. Rep. 94.

149. PRINCIPAL AND AGENT—Payment to Agent.—Where money paid on note reaches the hands of an agent authorized to collect it, it is a satisfaction of the debt.—*Stuart v. Stonebraker*, Neb., 88 N. W. Rep. 653.

150. PRINCIPAL AND AGENT—Proving Agency by Declaration of Agent.—A person's direct testimony that he is the agent of another is not objectionable as proving the agency by the declaration of the agent.—*American Telegraph & Telephone Co. v. Kersh*, Tex., 66 S. W. Rep. 74.

151. PRINCIPAL AND SURETY—Alteration of Note.—The alteration of a note by the addition of an obligor after the issue of the paper releases the previous obligors.—*M. Rumley Co. v. Wilcher*, Ky., 66 S. W. Rep. 7.

152. PUBLIC LANDS—Application for Additional Tract.—Where a settler on school land applies for an additional tract before acquiring title to his home tract, but acquires such title before the application is considered, the award held valid.—*Nowlin v. Hall*, Tex., 66 S. W. Rep. 116.

153. PUBLIC LANDS—Right of Grantee to Assert Title.—Where one entitled to patent to land from the United States conveys the land, and the patent is subsequently issued to him, he cannot assert title as against his grantee.—*Lyon v. Gombert*, Neb., 88 N. W. Rep. 774.

154. QUO WARRANTO—Assistant Superintendent of Police.—The position of assistant superintendent of police in the city of Chicago is an "office," and title thereto may accordingly be tested by *quo warranto*.—*Ptacek v. People*, Ill., 62 N. E. Rep. 580.

155. RAILROADS—Damages Caused by Sparks.—In an action to recover for the burning of crops by sparks from an engine, the burden held to be upon defendant to prove that the engine was provided with a proper spark arrester and that it was in perfect order.—*Illinois Cent. R. Co. v. Barret*, Ky., 66 S. W. Rep. 9.

156. RECORDS—Burnt Records.—Where a petition to confirm plaintiff's title under the burnt records act sets out his claim of title in the form of an abstract of title, with proper general averments preceding the chain of title, the petition should be held sufficient, though not in good form.—*Glos v. Cary*, Ill., 62 N. E. Rep. 555.

157. REPLEVIN—Defendant's Rightful Possession.—A nonsuit was properly granted in replevin, where the plaintiff only proved title to the property and that it had come rightfully into the defendant's possession; no wrongful detention being shown.—*Chas. H. Dodd & Co. v. Williams-Smithson Co.*, Wash., 67 Pac. Rep. 352.

158. ROBBERY—Instructions.—Under an indictment for robbery, the court should instruct as to that offense, and not merely as to petit larceny; it appearing that defendant seized a purse in the hand of one who

resisted, and overcame the resistance by force, though no blow was struck or injury inflicted.—*Commonwealth v. Davis*, Ky., 66 S. W. Rep. 27.

159. SALES—Acceptance at Reduced Price.—Where plaintiff, having ordered goods, examined them on their arrival, and found them damaged, and accepted them at a reduced price, he was without recourse on the seller.—*Earl v. Westfall Commission Co.*, Ark., 66 S. W. Rep. 148.

160. SALES—Damages for Breach of Warranty.—Where seed purchased on a warranty proves to be of an inferior quality, the value of the crop which would have been raised, less the expense of raising, and the value of the one raised, held the proper measure of damages.—*Dunn v. Bushnell*, Neb., 88 N. W. Rep. 693.

161. SALES—Rights of Subsequent Purchaser.—Where vendor of personality is allowed to retain possession after sale, rights of subsequent bona fide purchaser from him will be upheld.—*Flanigan v. Pomeroy*, Minn., 88 N. W. Rep. 761.

162. SCHOOLS AND SCHOOL DISTRICTS—Distribution of License Money.—A village treasurer, distributing license money among school districts not in accordance with the law, does so at his peril.—*Kas v. State*, Neb., 88 N. W. Rep. 776.

163. SHERIFFS AND CONSTABLES—Fee.—Where 66 tracts of land were joined in one proceeding to sell for special assessments, and 66 copies of the complaint were served on the owner, the sheriff was entitled to but one fee for such service.—*Sewer Dist. No. 1 of Ft. Smith v. School Dist. of Ft. Smith*, Ark., 66 S. W. Rep. 152.

164. SHERIFFS AND CONSTABLES—Liability of Sureties on Bond.—The sureties on the official bond of a constable held not liable for his conversion of money received from an execution debtor to prevent the service of an execution until after the determination of the appeal.—*Feller v. Gates*, Oreg., 67 Pac. Rep. 416.

165. STATES—Sale of State Property.—Constitutional provision, declaring that proceeds of sale of state property shall be applied to the bonded debt, held fully complied with when such proceeds are devoted to the interest on the public debt.—*Paik v. Candler*, Ga., 40 S. E. Rep. 523.

166. STATUTES—Adopted from Other States.—Where a statute adopted from another state has been altered in respect to a point on which prior construction largely rested, the court of the adopting state is not absolutely bound by such prior construction.—*Rhea v. State*, Neb., 88 N. W. Rep. 789.

167. STATUTES—Test of Title.—Test is not whether title of an act is most appropriate, but whether it fairly indicates scope and purpose of the act.—*State v. Power*, Neb., 88 N. W. Rep. 769.

168. TAXATION—Church Parsonage Rented to Another.—A church parsonage, which is not occupied by the minister, but is rented to another, is not exempt from taxation, though it be erected on the church lot, and though the rent be paid to the minister.—*Broadway Christian Church v. Commonwealth*, Ky., 66 S. W. Rep. 32.

169. TAXATION—Deficiency Judgment.—A deficiency judgment against landowner in suit to foreclose a tax lien is void.—*Kelley v. Wehn*, Neb., 88 N. W. Rep. 682.

170. TAXATION—Description of Lots Assessed.—A description of lots in an assessment roll and published list of delinquent taxes as being in a certain addition, without naming the city of which this addition is a part, is fatally defective.—*Asper v. Moon*, Utah, 67 Pac. Rep. 409.

171. TAXATION—Domicile.—In an action for the collection of personal property taxes against one who claimed to have removed his domicile to another state, evidence held sufficient to authorize a finding that the notes and securities taxed remained within the state.—*Matzenbaugh v. People*, Ill., 62 N. E. Rep. 546.

172. TAXATION — Excessive Payment.—One paying taxes in excess of constitutional limit may recover them, though not paid under protest.—Dakota County v. Chicago, St. P., M. & O. Ry. Co., Neb., 88 N. W. Rep. 663.

173. TAXATION — Recovery for Illegal Tax Sale.—Where a city acquires property for taxes under invalid proceedings, subsequently set aside after the property has been sold to an innocent purchaser, the taxpayer may recover the value of the property from the city.—City of Houston v. Walsh, Tex., 66 S. W. Rep. 106.

174. TAXATION—Sewer Assessments Not Proportioned to Benefits.—In an action on a special tax bill issued for the construction of a sewer, it is no defense that defendant's lot could not be benefited by the sewer.—Heman v. Schulte, Mo., 66 S. W. Rep. 163.

175. TELEGRAPHS AND TELEPHONES — Delivery of Messages.—Where a telegraph company under its rules did not deliver messages received after 7 P. M. until the next morning, it owed no duty, where a message was received exactly at 7 P. M., to deliver it that night.—Davis v. Western Union Tel Co., Ky., 66 S. W. Rep. 17.

176. TORTS — Committed as Agent.—An answer by one of two joint tortfeasors that he committed the tort as agent for the other is insufficient.—Diamond v. Smith, Tex., 66 S. W. Rep. 111.

177. TORTS—Conflict of Laws.—Unless alleged wrong was actionable in the jurisdiction in which it was committed, it is not actionable in any other jurisdiction.—Baltimore & O. S. W. Ry. Co. v. Read, Ind., 62 N. E. Rep. 489.

178. TRADE-MARKS AND TRADE NAMES — Refilling Stamped Bottles.—Refilling and selling gin bottles having the distiller's name, address, and registered monogram trade mark blown in the glass, held an infringement.—Van Hoboken v. Mohns & Kaltenbach, U. S. C. C., N. D. Cal., 112 Fed. Rep. 528.

179. TRESPASS — Complaint.—Where a complaint alleges that the defendants unlawfully entered on plaintiff's premises, a motion that plaintiff be required to specify the particular wrongful act done by each of defendants should be denied.—Commonwealth Co. v. Nunn, Colo., 67 Pac. Rep. 342.

180. TRIAL—Instructions.—The issues made by the pleadings and the evidence should be defined in the instructions, and the jury should not be referred to the petition to determine the issues.—Texas & N. O. R. Co. v. Mortensen, Tex., 66 S. W. Rep. 99.

181. TRIAL—Reading Opinions Before Jury.—Permitting the reading of opinions to the court in the presence of the jury, and afterwards commenting on the same, held an abuse of discretion.—Houston & T. C. R. Co. v. Gee, Tex., 66 S. W. Rep. 78.

182. TRIAL—Special Charges.—It is not error to refuse special charges, where the matter covered by them is sufficiently given in the main charge.—Texas & P. Ry. Co. v. Crockett, Tex., 66 S. W. Rep. 114.

183. TROVER AND CONVERSION—Measure of Damages.—The measure of damages for the conversion of standing timber held to be value of the timber standing at the time of conversion.—Chappell v. Puget Sound Reduction Co., Wash., 67 Pac. Rep. 321.

184. VENDOR AND PURCHASER—Agreement to Transfer Lien.—An agreement between vendor and purchaser, transferring a lien from one tract of land to another, was void as to one who held a mortgage on the tract to which the lien was transferred.—Watson v. Childers, Ky., 66 S. W. Rep. 13.

185. VENUE — Foreclosure.—Where cross complaint seeks to have real estate mortgage foreclosed, change of venue will not be granted because land is situated in another county.—Murphy v. Russell, Idaho, 67 Pac. Rep. 427.

186. VENUE—Vacate a Judgment.—An action to vacate a judgment is transitory, and is to be tried in the county in which the defendant resides.—State v. District Court of Chippewa County, Minn., 88 N. W. Rep. 755.

187. WATERS AND WATER COURSES—License.—Use for less than 10 years of real estate for flowage by gradual encroachment without agreement held not to establish an irrevocable license.—Johnson v. Sherman County Irr. Co., Neb., 88 N. W. Rep. 676.

188. WATERS AND WATER COURSES—Right to Ice.—Rights of the owner of a government fractional subdivision of land bordering on a non-navigable lake, to recover for ice taken without his consent, determined.—John Hilt Lake Ice Co. v. Zahrt, Ind., 62 N. E. Rep. 509.

189. WATERS AND WATER COURSES—Surface Water Caused by Roadbed of Railroad.—Railroad company must provide for discharge of water naturally flowing by roadbed, and on failure so to do is liable for damages.—Missouri Pac. Ry. Co. v. Hemingway, Neb., 88 N. W. Rep. 678.

190. WILLS — Admissions in Will Contests.—The admissions of one or several legatees named in a will held inadmissible on behalf of the contestant in a will contest case.—Wood v. Carpenter, Mo., 66 S. W. Rep. 172.

191. WILLS—Error in Calculation by Testator.—A will cannot be set aside because the testator made an error in a calculation resulting in the statement in the will that the bequest made to a certain child, considered in connection with certain advancements, renders the share of such child equivalent to that of the other children.—Wood v. Carpenter, Mo., 66 S. W. Rep. 172.

192. WILLS—Extent of Testamentary Power.—One may will his property for promotion of any purpose not illegal, immoral, or against public policy.—Thomas v. National Christian Assn., Neb., 88 N. W. Rep. 688.

193. WILLS—Lapsed Legacies.—A lapsed legacy goes to the residuary legatees, unless the will shows that testator intended the residuary gift to have only a limited effect.—Ler z v. Sims, Tex., 66 S. W. Rep. 110.

194. WILLS—Liability of Legacy for Legatee's Debts.—Property delivered by an executor to the beneficiary of the will as agent of such executor held not liable for the debts of such beneficiary.—Cox v. Patton, Tex., 66 S. W. Rep. 64.

195. WILLS — Revocation by Marriage.—Will of woman held not revoked by her subsequent marriage.—Kelly v. Stevenson, Minn., 88 N. W. Rep. 739.

196. WILLS—Transaction After Making of Will.—Evidence of transactions occurring after the execution of the will held inadmissible in a contest over the validity thereof.—Wood v. Carpenter, Mo., 66 S. W. Rep. 172.

197. WITNESSES—Credibility.—In an instruction as to credibility of witnesses, it is not error to charge the jury to consider their relationship to the defendant.—Van Buren v. State, Neb., 88 N. W. Rep. 671.

198. WITNESSES — Cross-Examination.—The refusal to allow a witness, who testified as to the value of certain printing, to be cross examined as to the amount of work and materials and their value, held erroneous.—Board of Comrs. of San Juan County v. Tulley, Colo., 67 Pac. Rep. 346.

199. WITNESSES—Discrediting Witness.—In an action for the collection of personal property taxes, it was error to admit, for the purpose of discrediting the defendant, the record of his conviction for making a false and fraudulent schedule of taxable property the previous year.—Ma'zenbaugh v. People, Ill., 62 N. E. Rep. 546.

200. WITNESSES—Widow of Insured.—In an action on a policy of insurance, the widow of insured was not competent to testify as to conversations with, or acts done by, or transactions with, decedent.—Manhattan Life Ins. Co. v. Beard, Ky., 66 S. W. Rep. 35.